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WILCOX & CO.

No. 3552

United States
Circuit Court of Appeals

For the Ninth Circuit.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation, Bankrupt.

E. L. COBB, as Trustee of the CRAIG LUMBER COMPANY, a Corporation, Bankrupt, and BANK OF ALASKA, a Corporation,

Appellants,

vs.

HILLS–CORBET COMPANY, a Co-partnership Composed of F. R. HILLS and W. W. CORBET,

Appellee.

Transcript of Record.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Index. Page

Names and Addresses of Attorneys of Record.

J. H. COBB, Esquire, Juneau, Alaska, for Trustee,
JOHN B. MARSHALL, Esquire, Juneau, Alaska, for Bank of Alaska,
Attorneys for Plaintiffs in Error.
GATES & HELSELL, 1209 L. C. Smith Building, Seattle, Wash.,
NEWARK L. BURTON, Esquire, Juneau, Alaska,
Attorneys for Defendant in Error.

In the District Court for the Territory of Alaska, Division No. 1, at Juneau, Alaska.

No. 31—IN BANKRUPTCY.

In the Matter of The CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Petition of Hills-Corbet Company to Reclaim.

Comes now Hills-Corbet Company and files herewith its petition to reclaim, and respectfully represents:

I.

That the Hills-Corbet Company is now, and at all times herein mentioned has been, a copartnership consisting of F. R. Hills and W. W. Corbet.

II.

That on October 31st, 1917, said Hills-Corbet Company entered into a conditional sale contract with the Craig Lumber Company, a corporation bankrupt, whereby the petitioner agreed to furnish all machinery, belts, saws, pipe and pipe fit-

tings, blow-pipe and fittings and iron necessary to equip the Craig Lumber Company's sawmill at Craig, Alaska, in accordance with specifications attached to said contract, and further agreed to build the buildings above pile foundations, install machinery, put on belting, install piping, etc.

III.

That a copy of said contract is herewith attached, marked Exhibit "A" and made a part hereof.

IV.

That it is provided in said contract that the title to the apparatus and material referred to therein should not pass from Hills-Corbet Company until all payments thereunder should have been fully made, and that said contract further provided that upon default in any such payments, said Hills-Corbet Company should have the right to retake the property described in said contract and to retain the amounts theretofore paid as liquidated damages by reason of the breach of said contract. [1*]

V.

That said contract further provided that the purchaser, Craig Lumber Company, was to pay the actual cost of all labor, machinery, equipment and building materials used in connection with the work, the cost of insurance and all costs except freight and transportation charges of material and men from Seattle, Washington, to Craig, Alaska, plus 10%, and that the cost of machinery, material and equipment to the said Craig Lumber Company

*Page-number appearing at foot of page of original certified Transcript of Record.

should be the cost f. o. b. ship's tackle, Seattle, Washington, plus 15% to the Hills-Corbet Company to cover operation expenses.

VI.

That in accordance with the terms of said contract, petitioner proceeded to ship the necessary machinery, equipment, etc., and to construct said mill at Craig, Alaska, and has completed said contract in accordance with its terms. That the said defendant Craig Lumber Co. has failed to pay the petitioner the sum of $12,980.36 due it in accordance with the terms of said contract and that by reason of failure to make said payments petitioner is entitled to the return of the property therein described.

VII.

That said contract was duly recorded in the Recording Office at Ketchikan, Alaska, being Recording District No. 8, on April 9, 1918, and was also filed in the office of the County Auditor of King County, Washington, within ten days from the completion of delivery of the last of the material, as required by the laws of the State of Washington.

VIII.

That all of the property covered by said contracts is now in the possession of the trustee in bankruptcy of the said Craig Lumber Company, a corporation.

WHEREFORE, your petitioners pray that the trustee in bankruptcy of the Craig Lumber Company, a corporation, bankrupt, be directed to de-

liver to your petitioners the said property described in the contract attached to this petition forthwith, and that your petitioners have such other and further relief as the Court may see just and proper.

HILLS-CORBET COMPANY,
By W. W. CORBET,
Petitioner.

GATES & HELSELL,
NEWARK L. BURTON,
Attorneys for Petitioner. [2]

State of Washington,
County of King,—ss.

W. W. Corbet, being first duly sworn, on oath deposes and says: That he is one of the petitioners in the above-entitled matter and is duly authorized to make this verification; that he has read the foregoing petition, knows the contents thereof, and that the same is true, as he verily believes.

(Signed) W. W. CORBET.

Subscribed and sworn to before me this 10th day of July, 1919.

[Notarial Seal]

(Signed) CASSIUS E. GATES,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of foregoing is admitted this 19th day of July, A. D. 1919.

J. H. COBB,
Attorney for Trustee.

Filed July 19, 1919. Referee in Bankruptcy,
First Division of Alaska. Box 613, Juneau, Alaska.

[Endorsed]: No. ——. In the United States District Court, Territory of Alaska, No. 1 Division. In the Matter of The Craig Lumber Co., a Corporation, Bankrupt. No. 31—In Bankruptcy. Petition of Hills Corbet Co. to Reclaim. Cassius E. Gates, Attorney for ————, 1209 L. C. Smith Building, Seattle, Wash., Main 6357, at which office they consent that service of all subsequent papers, except writ and processes, may be made upon them. [3]

Plaintiffs' Exhibit "A."

SPECIFICATIONS OF SAW-MILL MACHINERY
FOR
THE CRAIG LUMBER CO.
CRAIG, ALASKA.
BY
HILLS-CORBET COMPANY
SEATTLE, WASH.

Pltfs. Exhibit No. "A." Received in evidence. Mar. 17, 1920. In Cause No. 31-Bkcy. J. W. Bell, Clerk. By ————, Deputy. [4]

THIS AGREEMENT, by and between, HILLS-CORBET COMPANY, of Seattle, Wash., hereinafter called the Company, and the CRAIG LUMBER COMPANY, of Craig, Alaska, hereinafter called the Purchaser.

The Company agrees to furnish all Machinery, Belt, Saws, Pipe and Pipe Fittings, Blow Pipe and Fittings and Iron necessary to equip a saw mill

at Craig, Alaska, in accordance with the attached specifications and drawings, which specifications and drawings become a part of this agreement.

The above equipment to be billed F. O. B. ship's tackle, Seattle, Wash.

The Company also agrees to build buildings above pile foundations, install machinery, put on belting, install piping and turn the mill over to the Purchaser ready to run according to the attached drawings and specifications. The Purchaser is to drive all piles.

The Purchaser agrees to properly care for all apparatus and material delivered until the same is fully paid for, and to hold the Company harmless against the payment of any taxes assessed against the apparatus and material after it shall have been shipped. The Company shall keep the property, herein agreed to be sold, fully insured against damages or loss by fire, and to carry marine and *causility* insurance for the benefit of the Company and the Purchaser as their interests may appear, but in so insuring the property, the Company shall only be held liable for the exercise of a reasonable judgment in the selection of Insurance Company or Insurance Companies, with which it places the risk. [5]

The Company agrees to use all possible diligence in the prosecution of the work and to expedite the delivery and installation of machinery to the best of its ability. The Company is not in any event to be held liable for loss, damage, detention or delay caused by fire, strikes, lockouts, civil or mili-

tary authority, or insurrection or riot, action of the elements, forces of nature, or any other cause beyond its control, nor in any event for consequential damages.

The Purchaser agrees to pay all war taxes assessed or due on any of the material or work of whatever nature.

If for any reason the work is discontinued or interrupted before completion, the Purchaser agrees to pay the Company *with* Sixty Days all moneys due at the time of the interruption of the work, and also all sums which have been retained by the Purchaser as a guarantee for the fulfillment of the work or for any other reason including the Companies commission and all unpaid labor charges.

The title to the apparatus and material herein agreed to be sold, shall not pass from the Company until all payments hereinunder shall have been fully paid in cash. Upon default in any such payments the Company may re-take the property agreed to be sold. In such event the money heretofore paid by the Purchaser to the Company shall be presumed to be the amount of damages sustained by the breach of this agreement and shall be retained by the Company as liquidated damages for the breach. [6]

The Purchaser agrees to pay to the Company actual cost of all labor, machinery, equipment and building material used in connection with the work, (lumber and piles excluded), the cost of insurance and all costs except freight and transportation

charges of material and men from Seattle, Wash., to Craig, Alaska, plus ten per cent (10%). It being agreed that the Purchaser is to furnish all wood building material and to pay the freight and all transportation charges of material and men from Seattle, Wash., to Craig, Alaska.

It is agreed that the cost of the machinery, material and equipment is to be the cost F. O. B. ship's tackle, Seattle, Wash., plus Fifteen (15%) Per Cent to cover the operation expenses of the Company. The cost of labor is to be the actual cost to the Company.

It is agreed that the Purchaser will pay to the Company Fifty (50%) Per Cent of the cost of all machinery, material and equipment upon presentation of invoices with shipping papers, Twenty-five (25%) Per Cent in Forty Days from due date of First Payment and balance in Thirty (30) Days from completion of contract. The invoice to include the Ten (10%) Per Cent profit to the Company. Labor charges are to be paid in full by the Purchaser every month upon presentation of a bill by the Company which shall not include the Ten (10%) Per Cent profit to the Company. The Ten (10%) Per Cent profit to be paid in Thirty (30) Days from completion of contract.

It is agreed that the Purchaser has the right at any time to examine the books and requisitions of the Company to ascertain the cost of material, machinery and equipment purchased by them. [7]

It is agreed that the cost of the mill complete as per specifications and drawings will not exceed

the estimate of Thirty-two Thousand One Hundred Twenty-five & 00/100 ($32,125.00) Dollars.

It is agreed that the Company will do the work in a workmanlike manner and when the installation is completed it will be ready for operation and will be left in good running order.

Signed this thirty-first day of October, 1917, A. D.

HILLS-CORBET COMPANY.
By W. W. CORBET.
CRAIG LUMBER COMPANY,
By F. J. TROMBLE,
President.

Witness:
W. C. McCREERY. [8]

LOG HAUL UP.

ITEM #1.

1—2-11/16″ Shaft 6′6″ long.
2— " F. B. Boxes.
1— " Set Collar.
1—24x9″ Pulley.

CIRCULAR MILL.

ITEM #2.

1—Second Hand Lower Circular Arbor 3-15/16″ in Diameter made in two sections, first section about 8′3″ long, second section 10′3″ long.
1—3-15/16″x3-15/16″ Safety Flange Coupling New.
2—3-15/16″ Set Collars.
1—24x13″ Pulley, to drive upper saw.
1—12x9″ Pulley, to drive carriage feed.
1—36x24″ Main Drive Pulley.
1—14x13″ Pulley to drive front end counter shaft.
4—3-15/16″ F. B. Boxes, second hand.

2—2–15/16″ Adjustable upper arbor boxes new.
reverse idlers to be complete as follows:
1—1–15/16″ Shaft 3′ long.
1—1–15/16″ Shaft 5′ long.
2—20x13″ Idler Pulleys.
1—10x8″ Pulley to drive overhead Canters.
Equipment for Carriage Feed to be as follows:
1—24″x24″ Grooved Carriage Drum for 5/8″ Cable.
1—24x4″ Spur Gear.
1—2–15/16″ Shaft 4′6″ long.
2—2–15/16″ F. B. Boxes.
1—6x4″ Spur Pinion, Bored 2–7/16″ K. S. Standard.
1—30x10″ Square Iron Friction Bored 2–7/16″.
2—2–3/16″ Shafts 6′ long.
2—2–3/16″ Sliding Boxes.
2—2–3/16″ F. B. Boxes.
2—2–3/16″ Set Collars. [9]
2—10x11″ Spur Paper Frictions.
1—24x9″ Pulley.
1—36x9″ Pulley.
2—2–7/16″ Shafts 24″ long.
4—2–7/16″ Solid Boxes Babbitted.
2—36″ Idler Sheaves Grooved for 5/8″ Cable.
250′ 5/8″ Wire Cable.

COUNTER SHAFT UNDER LOG DECK.
ITEM #3.
1—2–7/16″ Shaft 20′ long.
3— “ F. B. Boxes.
2— “ Set Collars.
1—26x13″ Pulley, Receiving.
1—22x9″ Pulley, to drive haul up.

1—16x9″ Pulley, live roll drive.
1—12x7″ Pulley, Conveyor.
1—12x7″ Pulley, Machine Shop Counter.

MACHINE-SHOP COUNTER SHAFT.

ITEM #4.

1—1-15/16″ Shaft 24′ long.
4— “ F. B. Boxes.
2— “ Set Collars.
1—26x7″ Pulley, Receiving.

On this shaft will be pulleys to drive lathe countershaft and drill press, the exact size of these pulleys will be determined later.

LIVE ROLLS.

ITEM #5.

11—10x30″ Second Hand Live Rolls, Rolls arranged for five foot spacing and will be complete with boxes, gears, gear covers and drive. This drive to be reversible and will be complete with its boxes, frictions and two 10-T #82 sprockets for driving.

20′ #82 Chain. [10]

TRANSFER TO EDGER.

ITEM #6.

Iron Work complete for one four line, wood skid, foot trip transfer. Iron work to include head shaft 2-7/16″ Dia. 22′ long.

4—2-7/16″ F. B. Boxes.
4—13-T, #78 Sprockets.
1—10-T, #82 Sprocket.

Tail Shafts 1-15/16″ 10″ long, complete with their boxes and 13-T #78 Sprockets.

Trip Shaft 1–15/16″ Dia. 24′ long complete with its boxes, cams, links, foot treddle, etc.

55′ #78 Healed Chain.

ROLLS IN FRONT OF EDGER.

ITEM #7.

6—8″x60″ Dead Pipe Rolls complete with their boxes.

EDGER.

ITEM #8.

1—Second Hand, left hand, 8x60″ Hanson Edger to be complete as usually furnished, arbor pulley 18″ in Dia. 17½″ Face. Machine arranged for lining up stock on left hand side.

ROLLS BACK OF EDGER.

ITEM #9.

7—8x60″ Dead Pipe Rolls complete with their boxes.

DEAD ROLLS.

ITEM #10.

10—10x30″ Dead Wooden Rolls complete with 1–7/16″ shaft.

20—1–7/16″ Solid Boxes Babbitted.

DEAD ROLLS.

ITEM #11.

12—10x30″ Dead Wooden Rolls complete with 1–7/16″ shaft.

24—1–7/16″ Solid Boxes Babbitted. [11]

TRIM SAW.

ITEM #12.

1—Second Hand Trim Saw to be complete as usually furnished, including arbor with its pulley, swing hinges, etc.

RESAW.

ITEM #13.

1—Berlin Second Hand Re-saw, wheels 44″ Dia.

RESAW COUNTER SHAFT.

ITEM #14.

1—1–15/16″ Shaft 5′ long.
2— ″ F. B. Boxes.
2— ″ Set Collars.
1—20x11″ Pulley.
1—24x11″ Pulley.

RIP SAW.

ITEM #15.

1—#445 Mereen Johnson Rip Saw New, table is made of hard wood strips, securely glued together and has a heavy slotted batten secured to the back. Saws 16″ in Diameter. Floor space 4′x4′6″.

RIP SAW COUNTER SHAFT.

ITEM #16.

1—1–15/16″ Shaft 11′ long.
3— ″ F. B. Boxes.
2— ″ Set Collars.
1—20x7″ Pulley.
1—18x7″ Pulley.
1—8x5″ Pulley.

PRINTER.

ITEM #17.

1—Hall & Brown Improved Double Color, Boxboard Printer New, 16x24″ complete as usually furnished. [12]

PRINTER COUNTER SHAFT.

ITEM #18.

1—1-15/16″ Shaft 20′ long.
3— “ F. B. Boxes.
2— “ Set Collars.
1—24x5″ Pulley.
1—16x9″ Straight Face Pulley.

CUT-OFF SAW.

ITEM #19.

1—#460, New Mereen Johnson Cut-Off Saw Complete with table 5′x9′. Machine to be complete as usually furnished including one 16″ saw.

CUT-OFF SAW COUNTER SHAFT.

ITEM #20.

1—15/16″ Shaft 4′ long.
2— “ F. B. Boxes.
2— “ Set Collars.
1—20x6″ Pulley.
1—18x7″ Pulley.
2—1-15/16″ Shafts, 24″ long.
4— “ F. B. Boxes.
4— “ Set Collars.
2—16x7″ Idler Pulleys.

PLANER.

ITEM #21.

1—Berlin Second Hand Planer, # 47, 10x24″.

PLANER COUNTER SHAFT.

ITEM #22.

1—1-15/16″ Shaft 10′ long.
3— “ F. B. Boxes.
2— “ Set Collars.

1—24x13″ Pulley.
1—24x22″ Straight Face Pulley. [13]

EDGER COUNTER SHAFT.

ITEM #23.
1—3–7/16″ Shaft, 20′ Long.
3— “ F. B. Boxes.
2— “ Set Collars.
1—3–7/16″x2–7/16″ Safety Flange Coupling.
1—50x18″ Pulley.
1—36x22″ Pulley.
1—30x15″ Pulley.

EDGER COUNTER SHAFT.

ITEM #24.
1—2–7/16 Shaft 20′ long.
3— “ F. B. Boxes.
1—2–7/16″x2–7/16″ Safety Flange Coupling.

On this shaft will be pulleys to drive filing room, the exact size of these pulleys cannot be determined at this time.

EDGER COUNTER SHAFT.

ITEM #25.
1—2–7/16″ Shaft 16′ 6″ long.
3— “ F. B. Boxes.
1—30x13″ Pulley.
1—14x9″ Pulley.
1—12x5″ Bevel Iron Friction.

TRIM SAW COUNTER SHAFT.

ITEM #26.
1—1–15/16″ Shaft 18′ long.
2— “ F. B. Boxes.
1— “ Sliding Box.

2— " Set Collars.
1—12x5" Bevel Paper Friction.
1—8x5" Pulley. [14]

TRIM SAW COUNTER SHAFT.

ITEM #27.
1—2-7/16" Shaft 20' long.
3—F. B. Boxes 2-7/16".
2—2-7/16" Set Collars.
1—30x15" Pulley.
1—20x11" Pulley.

TRIM SAW COUNTER SHAFT.

ITEM #28.
1—2-7/16" Shaft 20' long.
3— " F. B. Boxes.
1—2-7/16"x2-7/16" Safety Flange Coupling.
1—18x13" Pulley.
1—24x9" Pulley.
1—20x7" Pulley.
1—22x7" Pulley.
1—12x5" Bevel Iron Friction.

RIP SAW COUNTER SHAFT.

ITEM #29.
1—1-15/16" Shaft 5'6" long.
1— " F. B. Box.
1— " Sliding Box.
1— " Set Collar.
1—22x7" Pulley.
1—12x5" Bevel Paper Friction.

MULE STAND.

ITEM #30.
1—2-7/16" Shaft 6' long.
2— " F. B. Boxes.

2— " Set Collars.
2–24x15" Pulleys. [15]

CONVEYOR COUNTER SHAFT.

ITEM #31.
1—2–7/16" Shaft 10′ long.
2— " F. B. Boxes.
2— " Set Collars.
1—30x13" Pulley.
1—18x13" Pulley.

CONVEYOR UNDER CIRCULAR MILL.

ITEM #32.
1—2–7/16" Shaft 4′6" long.
2— " F. B. Boxes.
1— " Set Collar.
1—48x4" Spur Gear.
1—18–T, #78 Sprocket.
1—1–15/16" Shaft 4′ long.
2— " F. B. Boxes.
1— " Set Collar.
1—6x4" Spur Pinion.
1—30x9" Pulley.
3—1–15/16" Shafts 30" long.
6— " Solid Boxes Babbitted.
6— " Set Collars.
3—18–T, #78 Sprockets.
130′ #78 Chain with B. & F. attachments every 3′.
[16]

CONVEYOR OVER BOILERS.

ITEM #33.
1—2–15/16" Shaft 4′ long.

2— " F. B. Boxes.
2— " Set Collars.
1—9-T #540 Sprocket.
1—36x4" Bevel Gear.
1—2-7/16" Shaft 4' long.
2— " F. B. Boxes.
2— " Set Collars.
1—6x4" Bevel Pinion.
1—32x8" Spur Iron Friction.
1—1-15/16" Shaft 3'8" long.
1— " F. B. Box.
1— " Sliding Box.
1— " Set Collar.
1—8x9" Spur Paper Friction.
1—28x9" Pulley.
1—2-7/16" Shaft 14' long.
3— " Solid Boxes Babbitted.
2— " Set Collars.
1—9-T #540 Sprocket.
1—15" #82 Sprocket.
1—2-3/16" Shaft 3' long.
2— " Solid Boxes Babbitted.
2— " Set Collars.
1—9-T #540 Sprocket.
1—8x3" Bevel Gear.
1—1-15/16" Shaft 30" long.
2— " Solid Boxes Babbitted.
2— " Set Collars.
1—18x10" Chain Drum. [17]
(ITEM #33 Contd.)
1—2-3/16" Shaft 4' long.

2— " Solid Boxes Babbitted.
1— " Set Collar.
1—15" #82 Sprocket.
1—8x3" Bevel Gear.
1—2–3/16" Shaft 3' long.
2— " Solid Boxes Babbitted.
2— " Set Collars.
1—9–T #540 Sprocket.
2—15" #82 Sprockets.
1—1–15/16" Shaft 30" long.
2— " Solid Boxes Babbitted.
2— " Set Collars.
1—18x10" Chain Drum.
50' #82 Healed Chain.
250' #540 Saw-dust Chain.

CONVEYOR TO BURNER.

ITEM #34.
1—2–15/16" Shaft 5' long.
2— " F. B. Boxes.
1— " Set Collar.
1—5–T Expansion Sprocket for 1"x7" Round Link Cable.
1—18" #87 Sprocket.
1—2–7/16" Shaft 3'6" long.
2— " Solid Boxes Babbitted.
2— " Set Collars.
1—20x20" Chain Drum for 1" Chain.
1—2–15/16" Shaft 5' long.
2— " F. B. Boxes.
1— " Set Collar.

1—5–T Expansion Sprocket 1″x7″ Round Link Cable.

1—18″ #87 Sprocket. [18]

(ITEM #34 Cont'd)

1—3–7/16″ Shaft 6′ long.

2— " F. B. Boxes.

1— " Set Collar.

1—5–T Expansion Sprocket for 1″x7 Chain.

1—40x5″ Spur Iron Gear.

1—2–15/16″ Shaft 6′ long.

2— " F. B. Boxes.

1— " Set Collar.

1—10x4″ Spur Pinion.

1—36x9″ Spur Iron Friction.

1—2–7/16″ Shaft 7′6″ long.

1— " F. B. Box.

1— " Sliding Box.

1— " Set Collar.

1—9x10″ Spur Paper Friction.

1—36x13″ Pulley.

1—2–15/16″ Shaft 3′6″ long.

1—2–7/16″ Shaft 3′6″ long.

2—2–15/16″ Solid Boxes Babbitted.

2—2–7/16″ " " "

2—2–15/16″ Set Collars.

2—2–7/16″ " "

2—20x20″ Chain Drums for 1x7″ Chain.

350′ 1″x7″ Round Link Cable Chain.

ENGINE TIGHTENER.

ITEM #35.

1—2–15/16″ Shaft 4′ long.

2— " F. B. Boxes.
2— " Set Collars.
1—30x25" Idler Pulley. [19]

ENGINE TIGHTENER.

ITEM #36.
1—2–15/16" Shaft 4' long.
2— " F. B. Boxes.
2— " Set Collars.
1—30x23" Tightener Pulley.
1

EDGER TIGHTENER.

ITEM #37.
1—2–3/16" Shaft 36" long.
2— " F. B. Boxes.
2— " Set Collars.
1—24x18" Tightener Pulley.

BOILERS.

ITEM #38.
2—72x18' O" Lap Joint 100 Lb. Pressure Boilers, complete with Dutch Oven setting and catalogue fittings. Second Hand.

FEED WATER PUMP.

ITEM #39.
1—7½x5x6" Steam Feed Water Pump. Second Hand.

LIGHTING OUTFIT.

ITEM #40.
1—7½ KW. Generator belted to one 10 HP. Automatic Engine. Second Hand.

ENGINE.

ITEM #41.

1—Second Hand 16x22″ Engine complete with all catalogue fittings.

1—Second Hand 18x22″ Engine complete with all catalogue fittings.

BELTING.

ITEM #42.

All Rubber Belting necessary for connecting transmission, as specified in specifications and shown on drawing.

LATHE.

ITEM #43.

1 Iron Lathe to Swing up to 16″ Second Hand. [20]

PIPING.

ITEM #44.

All Steam Piping necessary to connect up Engine with Boilers and Dry Kiln as specified and shown on Drawing.

BLOW PIPE SYSTEM.

ITEM #45.

Blow Pipe System including 40″ Exhaust Fan, collector and Piping to throw shavings into Boiler Room.

DRY KILN.

ITEM #46.

All Dry Kiln equipment including piping, trucks as per Blue-print furnished by the North Coast Dry Kiln Co.

FILING ROOM MACHINERY.

ITEM #47.

1—Grinder for Re-saw, Second Hand.

1—Saw Gummer for 60″ Saw, Second Hand.
1—Brazing Clamp, Second Hand.
1—Lap Grinder, Second Hand.
1—Shear & Punch, Second Hand.

SAWS.

ITEM #48.

2—60″ Inserted Tooth Second Hand Circular Saws for Head Rig.
2—Band Saws for Re-saw.
1—Set of Saws for Edger six in number, Second Hand.
2—16″ Saws for Rip Saw.
2—16″ Saws for Cut-Off in Box Factory.

ELECTRIC WIRE.

ITEM #49.

1000′ #14 Rubber Covered Wire.

LABOR.

ITEM #50.

All labor necessary for building of buildings, installation of Boilers, Engines, Pump, Feed Water Heater, Transmission, Edger, Boxboard Machinery and Planer, in fact everything that shows on the drawing and included in specifications. [21]

FEED WATER HEATER.

ITEM #51.

1—500 HP. second hand Feed Water Heater. [22]

No. 928. This certifies that the within Instrument was filed for record in the office of the Ketchikan Recording District No. 8, and recorded on the 9 day of April, 1918, at 9 o'clock A. M. in Vol. 4 of Misc., at page 258–266, of the records of said office at Ketchikan, Alaska.

WM. T. MAHONEY,
Recorder. [23]

Inv. No.	Date.	Description.		Contract.	Extra.
231	Nov. 15 '17	1 Berlin #283 (S. H.) Re-saw..	$ 603.50		
		Cartage	3.00		
			606.50		
		15% operating expense	90.98		
			697.48		
		10% profit	69.74	$ 767.22	
223	"	1 16"x22" Atlas Engine complete with catalog fittings.....			
		1 #3 Jewel Engine, automatic complete with cat. fit.	952.50		
		15% operating expense	142.88		
			1095.38		
		10% profit	109.53		
			1204.91	1204.91	
227	"	1 Frost Engine 18x20" (S. H.)..	827.50		
		15% operating expense	124.13		
			951.63		
		10% profit	95.16	1046.79	
235	"	1 60" Hand Saw Gummer (S. H.).	35.00		
		15% operating expense	5.25		
			40.25		
		10% profit 4.02		44.27	
226	"	1 16" Iron Lathe Complete with catalog fittings	450.00		
		1 12x5 Split Pulley bore 1 15/16".	4.00		

Inv. No.	Date.	Description.		Contract.	Extra.
226	Nov. 15 '17	1 16x5 Steel Pulley bore 1 15/16".	5.25		
			459.25		
		15% operating expense	68.89		
			528.14		
		10% profit	52.81	580.95	
221	"	Dry Kiln Equipment f. o. b. dock	3165.00		
		15% operating expense	474.75		
			3639.75		
		10% profit	363.97	4003.72	
229	"	1 #66 L. H. Coval saw sharpener (S. H.)	100.00		
		Crating	2.00		
		Cartage	3.00		
			105.00		
		15% operating expense	15.75		
			120.75		
		10% profit	12.07	132.82	
232	"	1 Mereen-Johnson #460 cut-off saw table	89.75		
		Freight	16.00		
		Unloading	1.00		
		Crating	8.82		
		Cartage	1.75		
			117.32		
		15% operating expenses	17.60		
			134.92		
		10% profit	13.49	148.41	

Inv. No.	Date.	Description.		Contract.	Extra.
230	Nov. 15 '17	1 #445 Mereen-Johnson Rip Saw..	$ 68.00		
		Table fob Minneapolis			
		Freight to Seattle	12.00		
		Unloading	1.00		
		Crating	8.82		
		Cartage	1.75		
			91.57		
		15% operating expense	13.74		
			105.31		
		10% profit	10.53	$ 115.84	
255	Nov. 27 '17	2 No. 1 Hussey Pat. Dry Kiln Doors	125.00		
		40 ft. Track & Fixtures.....		125.00	
241	"	1 72"x18' lap seam boiler com....	1579.50		
		15% operating expenses	236.93		
			1816.43		
		10% profit	181.64	1998.07	
233	"	50,000 common brick	450.00		
		16,000 standard sq. fire brick..	544.00		
		2,000 end wedge " " ..	68.00		
		1,000 side arch " " ..	34.00		
		4 tons fire clay	50.00		
		War tax	5.53		
			1151.53		
		15% operating expense	172.73		
			1324.26		
		10%	132.43	1456.69	

Inv. No.	Date.	Description.		Contract.	Extra.
224	Nov. 27 '17	1 7½ KW. 1100 RPM. 125 V. DC.			
		Generator complete	175.00		
		15% operating expense	26.25		
			201.25		
		10%	20.13	221.38	
237	"	1 Cyclone dust collector	55.36		
		15% operating expense	8.30		
			63.66		
		10%	6.37	70.03	
247	"	1 72"x20' Boiler, stack and fittings	988.34		
		15% operating expense	148.25		
			1136.59		
		10%	113.66	1250.25	
248	"	1 Lot of pipe fittings.....			
		1 Lot of blow pipe.....	40.72		
		15% operating expense	6.11		
			46.83		
		10%	4.68	51.51	
249	"	1 8'–0" of 5" pipe			
		1 15'–0" of 5" pipe			
		1 5" ell			
		1 21' 0" of 4" pipe			
		1 Lot of blow pipe			
		200 ' of ½" wire rope.....	77.02		
		15% operating expense	11.55		
			88.57		
		10%	8.86	97.43	

Inv. No.	Date.	Description.		Contract.	Extra
250	Nov. 27 '17	86 ½x36 bolts			
		10 ½x44 "			
		11 ⅝x36 "	$ 14.87		
		15% operating expense	2.23		
			17.10		
		10%	1.71	$ 18.81	
243	"	50 Bls. Pacific Line @ $1.70.....	85.00		
		25 Sacks Portland Cement @ $3.20 per Bl.	20.00		
			105.00		
		15% operating expense	15.75		
			120.75		
		10%	12.08	132.83	
236	"	78 Sos. 2 ply roofing	128.70		
		100 lbs. wire spikes 8′	5.05		
		2 kgs. com. wire nails 60D.....	9.90		
		4 " Do 40D.....	19.80		
		6 " Do 20D.....	29.70		
		2 " Do 12D.....	10.00		
		2 " Do 6D.....	10.30		
		2 500 sq. ft. rolls 2 ply bldg. paper	4.40		
			217.85		
		15% operating expense	32.68		
			250.53		
		10%	25.05	275.58	

Inv. No.	Date.		Description.		Contract.	Extra.
238	Nov. 27 '17	25 lb.	Wrot Washers	½		
		10 lb.		⅝		..
		10 lb.		¾		..
		5 lb.		⅞		..
		200	Mach. Bolts	½x6½		
		150		½x8		
		150		½x10		
		100		11		
		100		12		
		150		⅝x6½		
		150		8		
		100		10		
		200		12		
		150		¾x8		
		150		12		
		100		14		
		100		18		
		50		24		
		50		30		
		50	Cast Washers	1″		
		24	Do	1⅛		
		300	lin. ft. RD. Iron	½″		
		250	Do	⅝		
		200		¾		
		150		⅞		
		100		1		
		50		1⅛		
		100	Com. Iron	⅛x1	332.73	
		50		½x1½	332.73	
			15% operating expense		49.91	
					382.64	
			10%		38.26	420.90
238	"	50	Mach. Bolts	½x24		
		50	Do	30		

Inv. No.	Date.	Description.		Contract.	Extra.
238	Nov. 27 '17	50 Mach. Bolts 5/8x26	24.45		
		15% operating expense	3.67		
			28.12		
		10%	2.81	30.93	
					[26]
279	Jan. 23 '18	10,000 Standard square fire bricks @ 35.00	$560.00		
		2,000 end wedge fire brk. @ 35.00	70.00		
		1,000 side arch " " "	35.00		
		50,000 common bricks @ 9.00....	450.00		
		4 tons fire clay 12.50.....	50.00		
		70 bls. lime 1.70.....	119.00		
		1 Generator	200.00		
		1 Boiler Front	125.00		
		War Tax	5.63		$1614.63
280	Jan. 24 '18	142 sacks Superior Cement.....	113.60		
		15% operation expense	17.04		
			130.64		
		10% profit	13.06		143.70
282	"	102–1 Lineal ft. 2" blk. Pipe			
		83–2 " " 2½ " "			
		41–6 " " 3 " "			
		55–3 " " 4 " "			
		83–11 " " 5 " "			
		41–6 " " 6 " "			
		1 Pc. 6" Blk. Pipe 3'			
		2 " 6 " " 4'			
		1 " 6 " " 6'			
		1 " 6 " " 9'	365.15		

Inv. No.	Date.		Description.	Contract.	Extra.
282	Jan. 24 '18	10	6″ Threads	9.63	
		6	6 Cuts		
		2	4x closed Blk. Nipples		
		3	4x12 " "		
		2	5x closed " "		
		2	6x " " "		
		2	6x " " "	10.78	
		3	4″ C 1 Flange Unions		
		3	5 " " "		
		4	6 " " "		
		4	3″ Ells.		
		8	4 "		
		6	5 "		
		5	6 "		
		7	1½ "		
		8	2″ Tees.		
		3	2½ "		
		6	3 "		
		8	4 "	87.64	
		387–7	2″ Blk. Pipe	91.12	
		4	5″ C. I. Tees.		
		2	4x6 C. I. Tees		
		2	5x4x5 C. I. Tees.		
		3	5 " "		
		2	6 " "		
		2	6x4 " "		
		2	6 " Crosses	62.01	
		8	¾ Blk. Unions		
		6	1 " "		
		3	1½ " "		
		6	1½ " "		
		8	2 " "		
		3	2½ " "	11.18	

Inv. No.	Date.	Description.		Contract.	Extra.
282	Jan. 24 '18	4 1½ check valves			
		2 2 " "			
		2 ¾ Globe Valves			
		2 1 " "			
		6 1½ " "			
		4 2 " "	$ 59.86		
		2 2½ I. B. Gate Valves			
		2 3 " " "			
		3 4 " " "			
		5 5 " " "			
		1 6 " " "	212.67		
		61 ¾ Galv. Pipe	6.13		
		6 ¾ " Ells			
		7 1½ Blk. Ells	1.85		
		2 6x2½ Face Bushing.			
		2 6x2 " "	10.13		
			928.15		
		15% operating expense	139.22		
			1067.37		
		10% profit	106.74	$1164.11	
225	"	1 600 H. P. Feed Water Heater			
		1 7x5x10 Fairbanks Morse Pump.	400.00		
		Cartage	2.00		
		Crating	12.21		
			414.21		
		15% operating expense	62.13		
			476.34		
		10%	47.63	523.97	

Inv. No.	Date.	Description.		Contract.	Extra.
281	Jan. 24 '18	2 band Saws 22'x5"x19 Ga. 1¾			
		Spaced Left Hand	69.70		
		15% operating expense	10.45		
			80.15		
		10% profit	8.02	88.17	
284	"	Insurance Curacoa	40.43		
		" Bavall	30.85		
		" Liability	296.75		
			368.03		
		15% operating expense	50.20		
			418.23		
		10%	41.82	460.05	
285	"	Freight on Dry Kiln Doors.....	15.76		
		15% operating expense	2.36		
			18.12		
		10%	1.81	19.93	
287	"	4 1 Beams 10"x20' 0"			
		2 " 10"x12' 0"			
		2 " 10"x13' 0"			
		4 " 5"x10' 0"			
		4 " 5"x 4' 6"			
		2 " 6"x10' 0"	192.50		
		Loading	2.25		
		Freight	11.74		
		Cartage	4.00		
			210.49		
		15% operating expense	31.57		
			242.96		
		10%	24.21		$ 266.27

Inv. No.	Date.	Description.		Contract.	Extra.
288	Jan. 24 '18	1 Transfer Truck complete.....	$ 150.00		
		15% operating expense	22.50		
			172.50		
		10%	17.25		$ 189.75
286	"	Transmission Machinery as per enclosed manifest	1601.35		
		Cartage	9.50		
		Crating	37.97		
			1648.82		
		15% operating expense	247.32		
			1896.14		
		10%	189.61	$2085.75	
259	"	1 50" exhaust blower with 10"x10" pulley	90.00		
		15% operating expense	13.50		
			103.50		
		10% profit	10.35	113.85	
228	"	2 60" Inserted Tooth Circular Saws	180.00		
		Repairs	52.35		
		Cartage	.50		
			238.85		
		15% operating expense	35.83		
			274.68		
		10%	27.47	302.15	

Inv. No.	Date.	Description.		Contract.	Extra.
290	Jan. 24 '18	1 Smoke Stack 30″x40′	185.00		
		17 Grate Bars	90.00		
			275.00		
		15%	41.25		
			316.25		
		10%	31.62		347.87
283	"	25 lb. Wrt. Washers ½.....	2.50		
		10 lb. " " ⅝.....	.95		
		10 lb. " " ¾.....	.93		
		5 lb. " " ⅞.....	.45		
		10 lb. White Lead 2–5a.....	1.50		
		1 only Can Graphite 632 #2 Flake.	.65		
		2 L. C. Wire Tape #3 8oz.....	.70		
		½ Doz. 2 oz. Nokorode Solder Paste	.11		
		2 lb. ½x½ Solder 2 lb.	1.00		
		1000 Tind Tinners Rivets 1#			
		1000 2#			
		1000 12#	4.34		
		300 Lin. ft. Mild Steel Rd. ½ 320#.	15.84		
		250 " " ⅝ 307#.	14.89		
		200 " " ¾ 298#.			
		150 " " ⅞ 324#			
		100 " " 1 263			
		50 " " 1⅛ 205 .	51.78		
		100 " " Bands ⅛x1 53#.	3.42		
		50 Mild Steel ½x1½ 153 .	7.27		
		6 Rolls 2 ply 500 sa. ft. P. & B. Bldg. Paper	13.20		
		30 Sq. 2 ply Cascade Roofing.....	49.50		
		5 lb. Read Lead	.80		
		2 Cal. Roof Dressing	1.40		
			171.23		
		Insurance	1.95		172.18

Inv. No.	Date.	Description.		Contract.	Extra.
300	Jan. 24 '18	1 5′ Bath Tub and fittings.....$	57.96		$ 63.76
		10%	5.80		
291	Jan. 31 '18	Labor of B. F. Book No. 27 to Jan 8	202.30		
		Credit, advanced by Cloudy	75.42	$ 126.90	
301	Jan. 24 '18	Profit on Invoice No. 255 Nov. 27, 1917 .....$ 125.00			
		15% of $125.00.....	18.75	18.75	
		10%	143.75		
		10%	14.38	14.38	
		Profit on Invoice No. 283 Jan. 24, 1918 .....$ 172.18			
		15% of $172.18.....	25.83	25.83	
			198.01		
		10%	19.80	19.80	78.76
302	Jan. 28 '18	Freight on Boiler and fittings From Ballard to Grand Trunk Dock Nov. 26, 1917	4.50	4.50	
303	Jan. 31 '18	Cartage on Generator from Gray & Barash to Dock Jan. 24, '18	.75		
		Material for crating transmission	1.84		2.59
305	Feb. 8 '18	1 Only #50 High Lead Block, Mang.	220.50		
		15%	33.08		
			253.58		
		10%	25.36		278.94

Inv. No.	Date.	Description.		Contract.	Extra.
296	Feb. 4 '18	25 1″ Boom Chains (Second Hand but in good condition).....	112.50		
		15%	16.88		
			129.38		
		10%	12.94.		142.32
306	Feb. 4 '18	Insurance on material shipped on Admiral Wainright	28.45		
		15%	4.27		
			32.72		
		10%	3.27	35.99	
321	Mar. 2 '18	Transmission machinery as per enclosed manifest	4437.71		
		15%	665.66		
			5103.37		
		10%	510.33	5613.70	
319	Mar. 2 '18	300 ft. ¾″x6″x1½″ Conveyor Chain	150.00		
		2 ¾″x6″x1/12″ Cold Shuts.....	1.50		
			151.50		
		Cartage	1.50		
			153.00		
		15%	22.95		
			175.95		
		10%	17.60	193.55	

Inv. No.	Date.	Description.		Contract.	Extra.
289	Mar. 2 '18	1 48" Cutoff Saw	$ 74.75		
		15%	11.21		
			85.96		
		10%	8.60	$ 94.56	
322	"	24 Cotton Top Mattresses.....	50.40		
		15%	7.56		
			57.96		
		10%	5.80		$ 62.76
325	"	1 Piece of 3 15/16" Shafting 15' long	51.74		
		1 3 15/16" Flange Coupling.....	23.40		
			75.14		
		15%	11.27		
			86.41		
		10%	8.64		95.05
320	"	12 Double Deck Steel Bunks.....	132.00		
		15%	19.80		
			151.80		166.98
		10%	15.18		
323	"	3 Boiler feed rings as per sketch.	61.00		
		15%	9.15		
			70.15		
		10%	7.02		77.17
324	"	40 ft. of #82 plain chain			
		60 ft. of #78 " "			
		115 ft. of #78 B.&F attach. every 5 ft.			

Inv. No.	Date.	Description.		Contract.	Extra.
324	Mar. 2 '18	110 ft. of #82 Plain Chain			
		80 ft. of #104 " "			
		60 ft. of #104 " "			
		40 ft. of #87 " "	521.80		
		15%	78.27		
			600.07		
		10%	60.01	660.08	
317	"	25 Sacks Cement	46.88		
		15%	7.03		
			53.91		
		10%	5.39		59.30
328	"	4 360 Air tight stoves	48.00		
		4 6" All Bampers	.43		
		26 6" Galv. Stoves Pipe 26 ga.....	11.70		
		4 7 to 6 do 24 ga.....	2.80		
		Crating	3.00		
		25 lb. White waste	4.38		
		12 lb. ½ sq. Tapd. nuts.....	1.59		
		15 lb. ⅝ Do	1.73		
		15 lb. ¾ Do			
		15 lb. ⅞ Do			
		10 lb. 1 Do 40 lb.....	4.40		
		56 lb. Frictionless Babbitt Metal..	14.56		
		53 lb. Genuine Babbitt Metal	43.46		
		Insurance	.75		
			136.80		
		15%	20.52		
			157.32		
		10%	15.73		173.05

Inv. No.	Date.	Description.		Contract.	Extra.
345	Mar. 15 '18	Knives for planer			
		6 knives 24x4x7/16			
		4 " 4x6x7/16			
		42 Planer bolts #20 complete....	$ 60.14		
		15%	9.02		
			69.16		
		10%	6.92	$ 76.08	
330	"	150 ft. 5" 4 pl. Mohawk Belt			
		150 ft. 6" 4 pl. " "			
		210 ft. 7" 4 pl. " "			
		100 ft. 8" 5 pl. " "			
		125 ft. 8" 5 pl. " "			
		125 ft. 10" 5 pl. " "	394.20		
		360 ft. 12" 6 pl. R. S. "			
		84 ft. 14" 6 pl. " "			
		90 ft. 16" 6 pl. " "	676.07		
		175 ft. 20" 6 pl. Sagamore "	424.20		
			1490.00		
		15%	223.50		
			1713.50		
		10%	171.35	1884.85	
333	"	1000 ft. #4 R. C. Wire.....	14.50		
		15%	2.18		
			16.68		
		10%	1.67	18.35	
225–A	"	Welding pump shipped Jan. 24.	7.50		
		" heater shipped Jan. 24.	40.00		
			47.50		
		15%	7.12		
			54.62		
		10%	5.46	60.08	

Inv. No.	Date.	Description.		Contract.	Extra.
337	Mar. 15 '18	225 ft. 35# relayers.....	91.88		
		8 pairs fishplates	5.20		
		Cartage	1.50		
			98.58		
		15%	14.79		
			113.37		
		10%	11.33		$ 124.70
336	"	50 ft. 3" Heart single belt.....	20.88		
		6 sides Crescent Lace	44.18		
			65.06		
		15%	9.76		
			74.82		
		10%	7.48	82.30	
326	"	1 second hand Hanson Edger...	1360.49		
		15%	204.07		
			1564.56		
		10%	156.45	1721.01	
335	"	3 rolls of 2 ply roofing.....	11.40		
		15%	1.71		
			13.11		
		10%	1.31		14.42

[32]

Inv. No.	Date.	Description.		Contract.	Extra.
222	Mar. 15 '18	1 No. 47 Berlin Planer 10"x24"..	$1163.79		
		15%	174.57		
			1338.36		
		10%	133.84	$1472.20	
346	"	1 Brazing Clamp with legs.....	72.25		
		1 lap grinder	42.50		
			114.75		
		Freight	15.63		
			130.38		
		15%	19.56		
			149.94		
		10%	14.99	164.93	
362	Apr. 3 '18	Expenses of P. L. Hagen Graig to Seattle	139.34		
		W. M. Benn			
		R. J. Gibney			
		Theo. Barth			
		Expense of P. L. Haugen			
		W. M. Benn			
		H. J. Gibney at Wrangel Hotel..	27.00		
		P. L. Haugen & W. M. Benn 7½ days @ $6.50..	91.50		
		H. J. Gibney 8 days @ 7.00.....	56.00	312.84	

Inv. No.	Date.	Description.		Contract.	Extra.
369	Mar. 15 '18	3½ D. C. Generator with pulley rails			
		and rheostat	200.00		
		Cartage	1.00		
			201.00		
		15% 30.15			
			231.15		
		10%	23.11		254.26
370	"	Pump fitted with brass rods.....	565.00		
		Cartage	1.50		
			566.50		
		15% 84.98			
			651.48		
		10%	65.15		716.63
360	Apr. 3 '18	Insurance on Redondo 3/8/18..	35.00		
		15%	5.25		
			40.25		
		10%	4.03		44.28
367	Apr. 24 '18	1 Removable cylinder for FM Pump			
		7x5x10	15.55		
		Express	.98		
		Cartage	.50	17.03	
392	May 14 '18	Expenses of Al. McClellan and			
		C. M. Sweatt from Craig to			
		Seattle	76.30		
		6 days time @ $4.50.....	54.00	130.30	

Inv. No.	Date.	Description.		Contract.	Extra
393	May 15 '18	Interest on $5000 for 20 days @ 7%	$ 18.47		$ 18.47
		Interest charged by the bank on account of delay in payment by the Bank of Alaska at Wrangell pending adjustment of your acct.			
395	May 17 '18	Time and expenses of Carl Pauhl from Craig to Seattle	59.65	$ 59.65	
403	May 29 '18	1 30x24 double arm pulley, bore 3/15/16 K. S. Standard	150.00		
		Cartage	1.00		
			151.00		
		15%	22.65		
			173.65		
		10%	17.37		191.02
				$31780.40	$5220.10

PAYMENTS MADE.

Dec. 8 '17		$ 4020.44
Dec. 17 '17		3812.23
Jan. 24 '18	(Cr. Mem.)	11.56
Feb. 1	Cash	4461.63
Feb. 20	"	276.51
Mar. 5	"	361.45
Mar. 18	"	5000.00
July 19	"	1000.00
Dec. 8 '18		1000.00
	Total	$ 19943.82

SUMMARY.

Total Invoices under contract	$31780.40	
Total Invoices for extras	5220.10	
Payments		19943.82
Labor paid by Craig Lbr. Co.		6443.76
10% on Labor	644.37	
Balance due		11257.29
Totals	$37644.87	$37644.87

Filed August 14, 1919. H. B. Le Fevre, Referee in Bankruptcy. [34]

NOTE.—Plaintiff's Exhibit "A" (Plan of Sawmill for Craig Lumber Co., Craig, Alaska) omitted pursuant to stipulation of counsel.

In the District Court for the District of Alaska, Division No. One, at Juneau.

In the Matter of the CRAIG LUMBER COMPANY,

Bankrupt.

Amendment to Bill of Particulars.

Comes now the petitioner, Hills-Corbet Company, and amends its bill of particulars filed in the above-entitled action in the following particulars to wit:

	Contract	Extra
To invoices of Nov. 27, 1917, add following:		
Passenger fares of workmen from Seattle to Craig.....		477.36
Change Invoice No. 287 on page 5 to read on contract, as follows	266.27	
Change Invoice No. 283 on page 6 to read on contract, as follows....	172.18	
Change Invoice No. 323, on page 8 to read on contract, as follows..	77.17	
Change Invoice No. 330 on page 9 to read part on contract and part extra, as follows.....	1273.46	611.39
Omit Invoice 369 on page 10		

Change Invoice 360 on page 10 to read on contract, as follows..... 44.28

(Signed) NEWARK L. BURTON,
GATES & HELSELL,
Attorneys for Petitioner.

Filed in the District Court, District of Alaska, First Division. Mar. 17, 1920. J. W. Bell, Clerk. By ————, Deputy. [36]

In the United States District Court for Alaska, Division No. One, at Juneau.

No. 31—BANKRUPTCY.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Demurrer to the Petition of the Hills-Corbett Company.

Now comes E. L. Cobb, trustee in the above-entitled and numbered cause, and demurs to the petition of the Hills-Corbett Company on the ground that the said petition does not state facts sufficient to entitle the petitioner to the relief prayed for, or to any relief, for the following reasons, to wit:

(1) The relief prayed for, and the only relief that could be granted under the allegations of the petition is a return of certain property:

(2) Said relief is based upon the allegation that the said property was obtained by the bankrupt under a conditional sale, and the failure of

the bankrupt to pay the purchase price:

(3) The alleged contract of conditional sale attached to and made a part of the petition shows conclusively that the said contract was not a conditional sale, and a contract for the construction of a mill building and the equipping of the same with machinery.

(4) That the attempted reservation of title to the machinery, etc., was not a reservation of title till the purchase price was paid, but an attempted reservation to secure the entire amount of the building contract.

(5) There is not sufficient certainty in the description of the property to enable the Court to set apart and order a return of the same.

(6) All said machinery, apparatus & etc., has become, and is now a part of the realty upon which the mill was built.

WHEREFORE your Trustee prays that said petition be dismissed.

(Signed) J. H. COBB,
Attorney for Trustee.

Filed September 18, 1919. H. B. Le Fevre, Referee in Bankruptcy, First Division of Alaska, Box 613, Juneau, Alaska. [37]

In the District Court of the United States for the District of Alaska, Division Number One, at Juneau.

No. 31—IN BANKRUPTCY.

JOHN H. COBB, Esq.

In the Matter of CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

HILLS-CORBET COMPANY,

Petitioner,

vs.

E. L. COBB,

Trustee.

Decision of Referee, Newark L. Burton, Esq.

Friday, October 31, 1919.

This controversy arose upon the petition of the Hills-Corbet Company that the trustee be directed to deliver petitioner's certain property described in a contract for building and equipping the bankrupt's sawmill, on the ground that the contract is a conditional contract of sale wherein the title to the machinery installed in the sawmill was given third parties through the recording of the contract. Respondent moved that the petition be made more definite and certain and petitioners filed the contract and the plans and specifications.

Whereupon respondent demurred to the petition on several grounds among which the fourth and fifth grounds have been the subject of argument

between the counsel and which include the other grounds of the demurrer.

> "(4) That the attempted reservation of a title to the machinery, etc., was not a rese*ver*ation of title until the purchase price was paid, but an attempted rese*ver*ation to secure the entire amount of the building contract."
>
> "(6) All said machinery, a*pr*atus, etc., has become and is now a part of the realty upon which the mill was built."

It is true, as contended by the petitioners, that the parties were at liberty to make any agreement they chose. They agreed between themselves that the first payments under the contract be applied for the construction of the mill and the last payments upon the machinery. This contract was sufficient for the ends sought by the petitioner, as between the parties, but the power of the contract to bind third parties is lost. [38] Calling a building contract a conditional bill of sale does not make it so.

The object of the contract was to give the parties all the benefits of a chattel mortgage without compliance with the code provisions that would entitle them to such benefits.

It is not observable that the Uniform Sales Law has destroyed or supplanted the functions of a chattel mortgage.

> "The provisions of this act relating to contracts to sell and to sales do not apply unless so stated to any transaction in the form of a contract to sell or a sale which is intended to operate by way of mortgage, pledge, charge,

or other security." Chap. 65, Part VI, Sec. 75, p. 245, Sess. Laws 1913.

There was no straight sale made to the bankrupt. Though there was notice given that there was an agreement to deliver there was no delivery; there was no stated consideration, no definite description of the articles that were to be delivered and nothing to show that the articles to be delivered were in existence at the making of the contract. There was nothing tangible to be sold and the contention of the respondent, citing Thompkins vs. Monticello Cotton Oil Co., 137 Fed. 625, that petitioner is merely the holder of an equitable mortgage and that the claimed conditional sale was in fact a building contract, is convincing.

As the trustee stands in the bankrupt's shoes it is pertinent to inquire where the bankrupt stands. Had there been no bankruptcy, could not the creditors of the bankrupt have levied on the machinery? Was there fair notice, as provided by the code, to the bankrupt's creditors as the time of the bankruptcy? There was no notice of record that the machinery had been delivered, of what the bankrupt has or has not paid for it; nothing to show how the petitioners and the bankrupt stood in their debits and credits at the time of the bankruptcy though a year and ten monhts had elapsed since the making of the contract and there was no notice of the bankrupt's default. It is not reasonable to suppose all the code provisions intended to protect creditors in the matter of the retention of security on personal property may be avoided by an agree-

ment between the parties that they are going to fix title to things that have not materialized and that they may bar creditors forever without other or further notice. The attorney for the respondent seems right in saying that the petitioners are in the position of a chattel mortgagee who has not filed his mortgage. The bankruptcy has barred the petitioners [39] from any further right than that of general creditors.

It is not necessary to go into the question of whether chattels attached to and becoming realty may be detached and taken by the vendor who declares he reserves title, if there is no legal reservation of title. The petition shows that the equipment was attached to the mill and it is conceded that the mill was on piles driven into tide-land. So the bankrupt had title to the land—not as good a title as the freeholder—but a better title than anyone but the United States. It was the bankrupt's property and it is real estate and so is the equipment that is attached to the mill. The mill and attached machinery is real estate to such an extent that the petitioners could have taken a lien had they so desired.

Demurrer sustained and petition dismissed.

October 31, 1919.

H. B. LE FEVRE,

Referee in Bankruptcy, First Division of Alaska,
Box 613, Juneau, Alaska. [40]

In the District Court of the United States for the District of Alaska, Division Number One, at Juneau.

No. 31—IN BANKRUPTCY.

In the Matter of CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

HILLS-CORBET COMPANY,

Petitioner.

E. L. COBB, Trustee,

Respondent.

Petition for Review.

To H. B. Le Fevre, Esq., Referee in Bankruptcy:

Your petitioner respectfully shows:

That your petitioner filed a petition claiming certain property consisting of machinery, etc., under and by virtue of a Conditional Sale Contract, which said property is at Craig, Alaska, and in the possession of E. L. Cobb, trustee for the Craig Lumber Company, bankrupt, and prayed that the said trustee in bankruptcy of the Craig Lumber Company, a corporation, bankrupt, be directed to deliver to your petitioner the said property described in the Conditional Sale Contract attached to said petition and made a part thereof.

That on the 18th day of August a demurrer was filed to said petition.

That on the 6th day of November, 1919, an order was granted and entered by the referee, a copy of

which order is hereto annexed.

That said order was and is erroneous in matter of law for the following reasons, viz:

1. The petition upon its face states a good cause of action against the Craig Lumber Company, the bankrupt and the demurrer should not have been sustained.

2. That the order sustaining said demurrer is based upon a certain decision of the referee which states the following:

> "This contract was sufficient for the ends sought by the petitioner, as between the parties, but the power of the contract to bind third parties is lost."

While, in fact, it clearly appears upon the face of the petition that the proceeding is brought against the Craig Lumber Company the party making [41] and entering into the Conditional Sale Contract and not against any third party or parties, and it nowhere appears in the petition that any third party has in any way become interested in the property.

3. That it does not appear in the petition that any innocent *bona fide* purchaser for value received has acquired any interest in the property sought to be recovered by the Hills-Corbet Company, the petitioner, and, therefore, the order of the referee is based upon an assumption of fact *dehors* the record.

4. That such order sustaining the demurrer violates the binding condition in the agreement, as between the parties to such agreement, reserving the

title to the property described in the specifications attached to and made a part of said petition, which said reservation reads as follows:

> "The title to the apparatus and material herein agreed to be sold shall not pass from the company until all payments hereunder shall have been fully paid in cash. Upon default in any such payments the company may retake the property agreed to be sold."

That it appears from the decision rendered in the above-entitled matter certain findings were made which in no way appear upon the face of the petition and can have no application in passing upon a demurrer to said petition. That the order is, therefore, evidently based upon a decision assuming, without proof, evidentiary facts and which could only be made upon a defense by answer and the introduction of evidence.

6. That the entire decision upon which the order of the referee is based and from which he draws his conclusions resulting in the sustaining of the demurrer to the petition is erroneous both in matter of law and fact; that the facts recited in the decision are completely *dehors* the record, and to such assumed facts the referee makes an erroneous application of the law.

7. That the order is entirely unsupported by, and contrary to, the law applicable to the case.

Wherefore, your petitioner, feeling aggrieved because of such order, prays that the same may be reviewed, as provided in the bankruptcy law of 1898 and General Order XXVII, and that this petition

for review, together with the original petition of the Hills-Corbet Company in this matter against the trustee, the demurrer to said petition, the decision and order of the referee, and other papers filed with the referee herein which are pertinent to this review be certified to the Hon. Robt. W. Jennings, Judge of the District [42] Court, Div. No. 1, at Juneau, Alaska.

Signed) HILLS-CORBET COMPANY,
Petitioner.
By GATES & HELSELL and
NEWARK L. BURTON,
Their Attorneys.

United States of America,
Territory of Alaska,—ss.

I, Newark L. Burton, being first duly sworn, on my oath depose and say: That I am one of the attorneys for the petitioner mentioned and described in the foregoing petition; that the petitioner is a copartnership consisting of F. R. Hills and W. W. Corbet; that both of said parties composing said partnership reside without the Territory of Alaska; that the facts set forth in said petition are within my knowledge, information and belief.

(Signed) NEWARK L. BURTON.

Subscribed and sworn to before me this 10th day of November, 1919.

(Signed) H. H. FOLSOM,
Notary Public for Alaska.

My Commission expires Mar. 15, 1921.

[Endorsed]: Service of the within petition for review is hereby admitted this 10th day of November, A. D. 1919.

(Signed) J. H. COBB,
Attorney for Trustee.

Filed November 10, 1919. H. B. Le Fevre, Referee in Bankruptcy, First Division of Alaska, Box 613, Juneau, Alaska. [43]

In the District Court of the United States for the District of Alaska, Division No. One, at Juneau.

No. 31—IN BANKRUPTCY.

In the Matter of CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

HILLS-CORBET COMPANY,

Petitioner,

vs.

E. L. COBB, Trustee,

Respondent.

Opinion on Referee's Decision.

The question as to whether an instrument purporting to be a conditional bill of sale is in reality a mortgage does not always depend entirely upon the express terms of the instrument, and it may be that the instrument in question in this case is in reality a mortgage, but this Court has nothing before it except the instrument itself and there does not appear therein anything which militates against

the idea, plainly expressed therein, that the title to the specific chattels shall not pass until the stipulations of the contract are complied with. Counsel for the trustee affects to find something in the stipulation that the books of Hills-Corbet Co. should be open to the inspection of the Lumber Co., but in view of the fact that the purchase price to the Lumber Co. is to be the cost price to the Hills-Corbet Co. plus the latter's commission, it was simply a matter of good business that the Lumber Co. should have a means to assure itself of the actual cost of the Hill-Corbet Company. How else could they be assured?

In Forsman v. Marr, 35 So. 372, the only question before the Court was whether or not a certain agreement should be annulled for fraud, and the Court decided there was not sufficient proof of fraud.

The decision in 137 Fed. 625, is easily distinguishable. There the Court said:

> "Here, as stated, the title is apparently reserved. This is done [44] however, not for the purpose of giving the complainant absolute control over the machinery and equipment in case default in payment shall be made, but merely to secure the amount of its claim. It is true that complainant, on such default, is entitled to take possession of the machinery and other property named. There is, however, no independent and absolute right to hold or dispose of such property. On the contrary, the complainant is expressly obliged to sell it

at private or public sale after 30 days' advertising. It is also authorized to retain any balance that may be due on all notes, together with interest, traveling expenses, attorney's fees, and other fees connected with collection. This imports, of course, any balance which may remain after the proceeds of such sale are credited upon the notes. Even more significant is the stipulation that the complainant is obliged to 'pay us' (the defendants) any surplus. This is also characteristi*ng* of a mortgage rather than of a conditional sale. If, however, there is not enough of the proceeds of the machinery to pay the debt, by the same clause complainant is given the right to collect the deficiency from the defendants. All of these features are characteristic of a mortgage rather than conditional sale. We conclude, as between the parties to the contract itself, the rights of no third person having intervened, that this is nothing more or less than an equitable mortgage."

So also the case 136 U. S. 268:

"The notes upon their face show they were given for the purchase price of cars sold by the payee to the maker and they are 'secured' equally and ratably on the cars."

In 109 P. R. 328, there the question decided was not that the instrument was a mortgage instead of a conditional bill of sale. On the contrary, the Court held that even if it were a conditional bill of sale, it could not affect the status of certain fix-

tures which the innocent third person had the right to presume were a part of the realty.

So far as the machinery having become fixtures is concerned, I think this is a matter which cannot be determined by an inspection of pleadings—perhaps they are, perhaps not—it will take evidence to determine. [45]

The decision of the referee, sustaining the demurrer to the petition and dismissing the claim, is overruled.

(Signed) ROBERT W. JENNINGS,
District Judge.

Filed in the District Court, District of Alaska, Dec. 16, 1919. J. W. Bell, Clerk. By ————, Deputy. [46]

In the District Court for the Territory of Alaska, Division No. 1, at Juneau, Alaska.

No. 31—IN BANKRUPTCY.

In the Matter of THE CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Answer of the Trustee to the Petition of the Hills-Corbet Company to Reclaim.

Now comes the trustee by his attorney and for answer to the petition of the Hills-Corbet Company alleges:

I.

The trustee has no knowledge *of* information concerning the matters set out in paragraph I of said

petition and he therefore denies the same.

II.

The trustee denies that on October 31st, 1917, or at any other time, the Hills-Corbet Company entered into a conditional sale contract with the Craig Lumber Company, a corporation, bankrupt.

III.

Referring to paragraph VI of said petition, the trustee denies that the Craig Lumber Company has failed to pay the petitioner the sum of $12,980.36 due it in accordance with the terms of the contract referred to in said petition, or has failed to pay any sums due under said contract.

Referring to paragraph VIII of said petition, the trustee is unable to admit or deny for want of sufficient information, whether all the property referred to therein is in his possession or not and he therefore denies the same.

And for a further and affirmative defence, the trustee alleges as follows: That on or about the 31st day of October, 1917, the Craig Lumber Company, bankrupt, made and entered into a contract with the Hills-Corbet Company whereby the Hills-Corbet Company undertook to construct and equip for the Craig Lumber Company a sawmill at Craig, Alaska, according to certain plans and specifications attached to said contract. That a copy of said contract is attached to the petition herein. That by the terms of said contract, the Hills-Corbet Company was to advance all moneys [47] necessary to the performance of said work, including the purchase for the Craig Lumber Company of the ma-

chinery and equipment to be furnished by them in said contract and were to be reimbursed all such advances together with 15% thereon to cover the operating expenses, and were to receive for said advances and services a commission of 10%. It was further agreed that the total cost of said mill complete should not exceed $32,125.00. That under and pursuant to the terms of said contract the said Hills-Corbett Company did purchase for the Craig Lumber Company and as its broker or agent, the machinery and equipment referred to in the petition, advancing by way of a loan to the Craig Lumber Company the requisite moneys to cover the same, and did construct the buildings mentioned and with said machinery *equip* the same and delivered possession thereof to the Craig Lumber Company which then became and has ever since remained the owner thereof.

The trustee further alleges that the Craig Lumber Company has fully paid the Hills-Corbett Company all moneys due them including commissions earned under the said contract referred to in the petition.

And for a second affirmative defence, the trustee alleges:

That it was understood and contemplated by the Hills-Corbett Company at the time the contract mentioned in the petition was made that the machinery and equipment therein mentioned should be attached to and become a part of the Mill building and real estate of the Craig Lumber Company. That in truth and in fact it was so attached and became a

part of said realty, and is now a part thereof. That the Bank of Alaska, a creditor of the bankrupt, has a valid mortgage upon said realty to secure a valid debt for the sum of about $50,000.00; that it took said mortgage without any notice of the alleged claim of the Hills-Corbett Company and is an innocent purchaser for the value of said property.

WHEREFORE, the trustee prays said petition be dismissed with costs.

(Signed) J. H. COBB,
Attorney for Trustee. [48]

United States of America,
Territory of Alaska,—ss.

E. L. Cobb, being first duly sworn, on oath deposes and says: I am the trustee above named. I have read the above and foregoing answer and the same is true to the best of my knowledge and belief.

(Signed) E. L. COBB.

Subscribed and sworn to before me this 18th day of December, 1919.

[Notarial Seal] J. H. COBB,
Notary Public in and for Alaska.

My commission expires June 8, 1923.

Service of above and foregoing answer admitted this the 18th day of December, 1919.

N. L. BURTON.

Filed December 19, 1919. H. B. Le Fevre, Referee in Bankruptcy, First Division of Alaska, Box 613, Juneau, Alaska. [49]

In the District Court for the Territory of Alaska, Division No. 1, at Juneau, Alaska.

No. 31—IN BANKRUPTCY.

In the Matter of THE CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Reply of the Hills-Corbet Company to Answer of the Trustee.

Comes now Hills-Corbet Company and by way of reply to the affirmative matter alleged in the answer of the trustee in the above-entitled action says:

I.

The petitioner, Hills-Corbet Company, denies all of the allegations contained in the first affirmative defense of said trustee, except that petitioner admits the execution of the contract referred to in said affirmative defense and in the petition herein. The petitioner specifically denies that the Craig Lumber Company ever became the owner of the machinery and equipment referred to in said contract, and specifically denies that said Hills-Corbet Company has received all moneys due them under said contract.

II.

And your petitioner for reply to the second affirmative defense contained in the answer of the trustee says: That it denies all of the allegations contained in said second affirmative defense.

WHEREFORE, petitioner prays for the judgment requested in the petition filed herein.

(Signed) GATES & HELSELL,
N. L. BURTON,
Attorneys for Petitioner. [50]

State of Washington,
County of King,—ss.

W. W. Corbet, being first duly sworn, upon oath deposes and says: That he is one of the petitioners in the above-entitled action; that he has read the foregoing reply, knows the contents thereof, and that the same is true as he verily believes.

(Signed) W. W. CORBET.

Subscribed and sworn to before me this 26th day of December, 1919.

[Notarial Seal] FRANK P. HELSELL,
Notary Public in and for the State of Washington,
Residing at Seattle.

Service of a copy of the foregoing reply is admitted this 2d day of January, 1920.

(Signed) J. H. COBB,
Attorney for Trustee.

Filed January 3, 1920. H. B. Le Fevre, Referee in Bankruptcy, First Division of Alaska, Box 613, Juneau, Alaska. [51]

In the District Court for the Territory of Alaska, Division No. 1, at Juneau, Alaska.

In the Matter of THE CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Stipulation in re Hearing.

This agreement and stipulation made this 19th day of January, 1920, by and between Hills-Corbet Company of Seattle, Washington, hereinafter called the company, Bank of Alaska, a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, hereinafter called the Bank and E. L. Cobb, trustee in bankruptcy in the matter of Craig Lumber Company bankrupt hereinafter called the trustee, Witnesseth that—

Whereas, the company has filed before H. B. Le Fevre, referee in bankruptcy in the matter of Craig Lumber Company, bankrupt, a petition praying for the return to it of certain sawmill machinery and other property now in possession of the trustee; and

Whereas, the company claims to own said property under and by virtue of a contract attached to said petition upon the ground that payments under said contract have never been fully made; and

Whereas, the bank claims a lien on said machinery and property by virtue of a mortgage upon the real estate of the Craig Lumber Company which said bank claims to be prior to the rights of the Company; and

Whereas, the bank desires to foreclose said mort-

gage and make a sale of the real estate and the machinery and property now situated thereon as a whole prior to the decision of the referee or the District Court for the District of Alaska, Division No. 1, upon the controversy between the parties hereto:

Now, Therefore, it is agreed between the parties hereto as follows: [52]

1. That the bank shall sell the machinery and other property claimed by the company and shall account therefore as follows: The bank shall deliver to the company a bond in the penal sum of Twelve Thousand ($12,000.00) Dollars executed by the bank as principal and the United States Fidelity and Guaranty Company, a corporation, of Baltimore, Maryland, as surety, conditioned that the bank shall pay to the company such sum of money as shall be found by the United States District Court for the Territory of Alaska, Division No. 1, or by a higher court in case of appeal or review, to be due the company under and by virtue of the contract relied on by said company in their petition, providing the final judgment of the United States District Court for the Territory of Alaska, or any other higher court upon appeal or review shall sustain the rights of the company as against the rights of the bank in and to the said machinery and property. Said bond shall contain a provision that judgment thereon may be rendered by said court or courts upon the determination of the controversy herein referred to.

2. The bank consents to be bound by the final judgment in the controversy over the said machinery and property whether the final judgment be ren-

dered by the District Court for the Territory of Alaska, Division No. 1, or by a higher court on appeal, and to that end hereby enters its appearance in this action for that purpose.

3. That the issues of law and fact raised by the petition of the company and the answer of the trustee be returned to the United States District Court for the Territory of Alaska, Division No. 1, for hearing and decision and to that end that the said District Court enter an order in this cause directing the return by the referee to the clerk of said court of all of the pleadings, papers, files and entries filed with or made by the referee in the controversy referred to for the determination of said issues in the first instance by the said District Court.

4. That this stipulation and agreement shall not be binding or effective for any purpose until the bond referred to in paragraph one shall be executed and approved by Newark L. Burton or Frank P. Helsell, attorneys for the company and until the said District Court enters an order [53] approving this stipulation and an order as mentioned in paragraph 3 hereof.

HILLS-CORBET COMPANY.
(Signed) By FRANK P. HELSELL,
" NEWARK L. BURTON,
Its Attys.
BANK OF ALASKA,
(Signed) By JOHN B. MARSHALL,
(Signed) J. H. COBB,
Atty. for Trustee in Bankruptcy.

Approved this 19th day of January, 1920.

(Signed) H. B. LE FEVRE,

Referee in Bankruptcy, First Division of Alaska, Box 613, Juneau, Alaska.

Approved this March 16, 1920.

(Signed) ROBERT W. JENNINGS,

Judge.

Filed in the District Court, District of Alaska, First Division. Jan. 20, 1920. J. W. Bell, Clerk. By ————, Deputy. [54]

In the U. S. District Court, for the Territory of Alaska, Division No. 1, at Juneau, Alaska.

In the Matter of THE CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Order in re Hearing.

Upon stipulation of all of the parties interested, it is hereby ordered that the controversy now pending in the above-entitled cause before Hon. H. B. Le Fevre, referee in bankruptcy, wherein Hills-Corbet Company is petitioner and the trustee in bankruptcy and Bank of Alaska are respondents, be and the same is transferred to this court for hearing in the first instance; that the said referee will deliver to the clerk of this court all the pleadings, files and papers and all entries made in said controversy and will take no further steps therein.

Done in open court this 20th day of January, 1920.

(Signed) ROBERT W. JENNINGS.

O. K.—COBB.

Filed in the District Court, District of Alaska, First Division. Jan. 20, 1920. J. W. Bell, Clerk. By ————, Deputy. [55]

In the United States District Court, Territory of Alaska, Division No. 1, at Juneau, Alaska.

In the Matter of THE CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Bond of Bank of Alaska.

KNOW ALL MEN BY THESE PRESENTS, That we, Bank of Alaska, a corporation organized and existing under and by virtue of the laws of the Territory of Alaska, as principal, and United States Fidelity and Guaranty Company, a corporation organized and existing under and by virtue of the laws of the State of Maryland, as surety, are jointly and severally held and firmly bound unto Fred R. Hills and W. W. Corbet, copartners under the firm name of Hills-Corbet Company, in the sum of Twelve Thousand ($12,000.00) Dollars, for the payment of which we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents.

Dated at Juneau, Alaska, this 23d day of January, 1920.

The condition of this obligation is such that whereas there is now pending before the referee in

bankruptcy, H. B. Le Fevre, in a cause entitled "In the Matter of Craig Lumber Company, Bankrupt," a petition by Hills-Corbet Company that the trustee in bankruptcy of Craig Lumber Company surrender to said Hills-Corbet Company certain sawmill machinery and other property, and whereas the Hills-Corbet Company claims the title to said sawmill machinery, and other property upon the ground that said property was delivered to the Craig Lumber Company under a Conditional Sale Agreement and has never been paid for as provided for in said Agreement; and

Whereas, all parties agree that said sawmill machinery and other property should be sold to avoid depreciation and have agreed that the Bank of Alaska may sell said property upon giving this bond—

Now, Therefore, if the Bank of Alaska shall pay to Fred R. Hills and W. W. Corbet, copartners under the firm name of Hills-Corbet Company, the sum of money which the U. S. District Court, etc., *Court* or any higher [56] court on appeal or review shall find to be due to Hills-Corbet Company under and by virtue of said Agreement between Hills-Corbet Company and Craig Lumber Company, then this obligation shall be void; otherwise to remain in full force and effect.

This bond shall be of no force and effect unless the United States District Court for the Territory of Alaska, Division No. 1, or an appellate court upon appeal or review shall sustain the petition of the Hills-Corbet Company as against the claims of

the Bank of Alaska or the trustee in bankruptcy.

In case the United States District Court for the Territory of Alaska, Division No. 1, or an appellate court on appeal or review, shall sustain the rights of Hills-Corbet Company, judgment may be entered by said court or courts directly against the bond and the parties thereto for the amount found due Hills-Corbet Company as set forth above.

BANK OF ALASKA,
By E. A. RASMUSON,
President,
[Seal—Bank of Alaska] Principal.

UNITED STATES FIDELITY & GUARANTY COMPANY,
[Seal] By R. E. ROBERTSON,
Attorney-in-fact,
Surety.

Filed in the District Court, District of Alaska. Jan. 24, 1920. J. W. Bell, Clerk. By ————, Deputy. [57]

In the District Court for the District of Alaska, Division No. One, at Juneau.

In the Matter of the CRAIG LUMBER COMPANY,
Bankrupt.

HILLS-CORBET COMPANY,
Petitioner,

vs.

E. L. COBB, Trustee, and BANK OF ALASKA,
Respondents.

Findings of Fact and Conclusions of Law.

This cause came on for trial upon stipulation between all the parties hereto and was tried before the above-entitled court, without a jury, on the 17th day of March, A. D. 1920, upon the complaint, answer and reply filed in the above-entitled court in the above-entitled cause. The plaintiff was represented by their attorneys, Frank P. Helsell and Newark L. Burton, and the defendant E. L. Cobb, trustee for the Craig Lumber Company, bankrupt, was represented by John F. Cobb, his attorney; and the Bank of Alaska, claiming to be the owner of the property in dispute, was represented by John B. Marshall, its attorney. After hearing all the evidence submitted in the above-entitled cause, and the arguments of counsel, and the Court being now fully advised in the premises, makes, signs and files the following Findings of Fact and Conclusions of Law, viz.:

FINDINGS OF FACT.

I.

That the Hills-Corbet Company was at all times mentioned in the complaint and at the time of filing the same in the above-entitled court in the above-entitled cause a copartnership consisting of F. R. Hills and W. W. Corbet. [58]

II.

That on October 31st, 1917, the said Hills-Corbet Company entered into a contract with the Craig Lumber Company, a corporation, bankrupt, whereby they agreed to furnish all machinery, belts, saws, pipe and pipe fittings, blow-pipe and fittings and

iron necessary to equip the Craig Lumber Company's sawmill at Craig, Alaska, in accordance with specifications and particulars attached to and made a part of said contract; and further agreed to build the buildings above pile foundations, install machinery, put on belting, install piping, etc.

III.

That said contract provided that the cost of the mill complete as per specifications and drawings "will not exceed the estimate of $32,125."

IV.

That said contract of sale contains the following clause, viz.: "The title to the apparatus and material herein agreed to be sold shall not pass from the company until all payments hereunder shall have been fully paid in cash. Upon default in any such payments the company may retake the property agreed to be sold. In such event the money heretofore paid by the purchaser (Craig Lumber Company) to the company (Hills-Corbet Company) shall be presumed to be the amount of damages sustained by the breach of this agreement and shall be retained by the company as liquidated damages for the breach."

V.

That said contract of sale further provides: That the Craig Lumber Company shall pay to Hills-Corbet Co. the actual cost of all labor, machinery, equipment and building material used in connection with the work (lumber and piles excluded) the cost of insurance and all costs except freight and transportation charges of material and men from Seattle, Wash., to Craig, Alaska, plus ten per cent; that the cost of ma-

chinery, material and equipment was to be the cost F. O. B. ship's tackle, Seattle, Wash., plus fifteen per cent to cover the operating expenses of the company; that "the purchaser (Craig Lumber Co.) will pay the Company (Hills-Corbet Co.) fifty per cent of the cost of the machinery, material and equipment upon [59] presentation of invoices with shipping papers; twenty-five (25%) per cent in forty days from due date of first payment and balance in thirty days from completion of contract."

VI.

That the Court finds from the evidence that all the machinery, material, etc., agreed to be furnished under the contract of sale aforesaid were delivered to said Craig Lumber Co. at Craig, Alaska, and the mill fully completed and the contract aforesaid fully complied with, on or about May 1st, 1918.

VII.

That the petition filed in this case asks that the trustee in bankruptcy of the Craig Lumber Company be directed to deliver to the Hills-Corbet Company the property described in said contract of sale, because of the failure of said Craig Lumber Company to pay the petitioner, the Hills-Corbet Co., the sum of $12,980.36 due it in accordance with the terms of said contract.

VIII.

That before the trial of this case the trustee in bankruptcy of the Craig Lumber Company, and the Bank of Alaska, entered into a stipulation with the Hills-Corbet Company, which said stipulation is filed in this cause, under which stipuulation the said bank

took possession of the property at Craig, Alaska, described in said contract; and stipulated and agreed with the Hills-Corbet Company that if the Court should find that said contract was a conditional sale contract, it should also make a further finding as to the amount due the Hills-Corbet Company under said contract for which, if any amount so found due to the Hills-Corbet Company, the said bank gave a written undertaking, to pay, which is on file in this Court in the foregoing entitled cause.

IX.

That the sawmill is constructed on piles on the tideland, within a forest reservation, to which no one had any title except the Government of the United States; that all the machinery, etc., were so attached to the buildings by bolts and screws as to be easily moved from the said mill without damaging the building in any way whatsoever. [60]

X.

That the Bank of Alaska, one of the parties to this action, claims to own the machinery, etc., covered by the contract of sale between the Hills-Corbet Co., petitioner, and the Craig Lumber Company, debtor, by virtue of a mortgage executed and given by said Craig Lumber Co. to the said bank prior to the furnishing of said machinery, etc., to said Craig Lumber Company. That it appears from the uncontradicted evidence that the said Bank of Alaska, at the date of the execution of said mortgage, had knowledge of the conditional sale contract, and knew that the machinery was not paid for and that said contract provided that title should not pass until full

payment of the purchase price had been made.

XI.

That the machinery covered by said contract of sale never passed under the "after-acquired" clause in the mortgage of the Bank of Alaska, one of the parties to this action, for the reason that the mortgagor never did "acquire" such machinery, the title never having passed.

XII.

That the machinery, material, etc., furnished and delivered under said contract, including the work and labor performed thereunder and the 10% and 15% provided for in said contract as aforesaid, amount to the sum of $32,539.74, but under the contract the mill was to be built and installed for $32,125.00; therefore, the Court finds the latter sum, ($32,125) as being the "invoices under contract and 10% on labor."

XIII.

The Court finds that in addition to the material, machinery, etc., furnished to the Craig Lumber Company under the aforesaid contract of sale, the petitioners also furnished and delivered to the said Craig Lumber Company other material, machinery, etc., for which the total invoice charge is the sum of $6,054.59; that included within this $6,054.59 is a charge of $95.80, being 10% and 15% on invoices Nos. 296, 305 and 306, which said amount of $95.80 should not be allowed; thus reducing said amount to $5,958.79.

XIV.

That the total payments made is the sum of $19,-943.82; that in addition to said payment the Craig Lumber Company, debtor, is entitled to a credit of

[61] $8,312.58 which it paid out for labor for the Hills-Corbet Company under the contract, leaving a total balance of $9,827.39 due to the Hills-Corbet Company.

XV.

That the Craig Lumber Company, debtor, itself specifically directed the application of certain payments to be applied on extras; that the sum of $7,000.00, total payments made on March 18, July 19 and December 8th, 1918, was not specifically applied by the Craig Lumber Company, debtor.

XVI.

That the evidence to the effect that the Craig Lumber Company, debtor, agreed to board the men employed by the Hills-Corbet Company in the doing and performing of said work is absolutely undisputed, and the Court finds that the Craig Lumber Company did agree to board said men, assuming the indebtedness therefor.

XVII.

That the total amount due to Hills-Corbet Company under the contract, after making the application of the payments to the extras and to the contract as in these findings set forth, is the sum of $9,827.39, together with interest at the rate of 8% from July 1st, 1918, said date being more than 30 days after the completion of the contract. [62]

From the foregoing Findings of Fact the Court concludes:

CONCLUSIONS OF LAW.

I.

That the contract of sale attached to and made a

part of the complaint filed in this case is a conditional sale contract, and the property covered thereby and described in the specifications attached thereto and made a part of said contract remain the property of the Hills-Corbet Company until the full purchase price is fully paid and the title to said property was not to pass until the same was fully paid for.

II.

That the machinery is so attached by bolts and screws as to be easily moved without damaging the building, and, therefore, the conditional sale contract whereby the Hills-Corbet Company retain title to said machinery is in no way affected thereby.

III.

That the claim of the Bank of Alaska, one of the parties to this action, to the machinery covered by the said conditional sale contract is without force or effect; that the machinery did not pass under the "after-acquired" clause of the mortgage, under which the said bank claims said machinery, for the reason that the mortgagor never did acquire such machinery, the title never having passed, and the title to the said machinery remained in the Hills-Corbet Co., under and by virtue of the aforesaid conditional sale contract.

IV.

That the application of payments other than those specifically applied should be and are first applied by the Court upon the unsecured indebtedness of the debtor to the Hills-Corbet Company, and the balance upon the conditional sale contract.

V.

That the Court finds that the Hills-Corbet Company is entitled to a judgment against the Bank of Alaska and the U. S. Fidelity & Guaranty Company in the sum of $9,827.39, together with interest thereon at the rate of 8% per annum from July 1, 1918. [63]

Done in open court this 16th day of June, A. D. 1920.

(Signed) ROBERT W. JENNINGS,
Judge.

Received a copy of foregoing Findings of Fact and Conclusions of Law this 8th day of June, A. D. 1920.

(Signed) J. H. COBB,
Attorney for Trustee.

Filed in the District Court, District of Alaska. Jun. 15, 1920. J. W. Bell, Clerk. By ————, Deputy. [64]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1964—A.

In the Matter of the CRAIG LUMBER COMPANY,

Bankrupt.

HILLS-CORBET COMPANY,

Petitioner,

vs.

E. L. COBB, Trustee, and BANK OF ALASKA,

Respondents.

Judgment.

WHEREAS, the above-named Hills-Corbet Company did heretofore file with the referee in bankruptcy in the above-entitled cause its complaint and petition, claiming the ownership in itself of certain property then in the hands of the trustee in bankruptcy, which said complaint and petition was demurred to by said trustee as not stating facts sufficient; and,

WHEREAS, said demurrer was by the referee sustained, and said Hills-Corbet Company appealed to this Court, which, on consideration, reversed said decision of the referee; and,

WHEREAS, an answer to said complaint and petition, and a reply thereto were duly filed, and a stipulation concerning the deposition of the matters involved was duly entered into by the said Hills-Corbet Company, the trustee in bankruptcy, and the Bank of Alaska, a corporation, which said stipulation was approved by the referee on the 19th day of January, 1920, and by this court on the 16th day of March, 1920, and filed herein on the 20th day of January, 1920; and,

WHEREAS, the cause came on for trial in this court on March 17, 1920, on said pleadings and stipulation, all the parties to the action, and the Bank of Alaska, being present by respective counsel, a jury having been expressly waived by statement made in open court and evidence and argument duly heard, and the Court having taken the matter under advisement and [65] having, on, to wit, June 15, 1920,

made and filed herein its findings of fact and conclusions of law wherein all the material allegations of the petition are sustained and the amount due under the conditional sale contract set forth in said stipulation was determined; and,

WHEREAS, all the parties to said above-entitled cause, including said Bank of Alaska, stipulated herein that if this Court should decree that the contract sued upon was a conditional sale contract it should render judgment against the Bank of Alaska for the amount found to be due (for the securing of which amount the said Bank of Alaska executed and filed its undertaking in this cause), and the Court being now fully advised in the premises and said Hills-Corbet Company now moving for judgment in accordance with the said findings and stipulation,—

IT IS HEREBY ORDERED, ADJUDGED and DECREED that the contract sued on in the above-entitled cause is a conditional sale contract, and that by reason of failure to make payment of the full purchase price as provided in said contract the title to the property described in said contract and specifications attached thereto and made a part thereof did not pass, and that neither the Craig Lumber Company nor E. L. Cobb, trustee, ever acquired any title to said property, but the title remained in the Hills-Corbet Company, the petitioner.

IT IS FURTHER ORDERED, ADJUDGED and DECREED that Fred R. Hills and W. W. Corbet, doing business under the firm name and style of Hills-Corbet Company, do have and recover of and from the Bank of Alaska, a corporation organized

and existing under and by virtue of the laws of the Territory of Alaska, the sum of $9,827.39 and interest at the rate of 8 per cent per annum from July 1st, 1918, besides the costs and disbursements herein taxed by the clerk.

Done in open court this 31st day of July, A. D. 1920.

(Signed) ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska. Jul. 30, 1920. J. W. Bell, Clerk. By ————, Deputy.

Entered Court Journal No. P, pages 440, 441. [66]

In the Matter of CRAIG LUMBER COMPANY,
Bankrupt.

HILLS-CORBET COMPANY.

vs.

E. L. COBB, Trustee.

Opinion.

There is little or no dispute that the machinery mentioned in the contract and claimed to have been delivered by the Hills-Corbet Company under said contract, as shown by the bill of particulars and amendment thereof, were delivered, nor that the other obligations charged in said bill of particulars and amendment thereto are proper charges against the said Craig Lumber Company.

The items under the contract amount to $31,708.49,

but I think the amount charged for extras, to wit, $6,054.59, should be reduced to $5,978.79. (I arrive at this figure by allowing the claim made by Tromble in his letter of February 25, 1918 (Exhibit "H"), to the effect that the Hills-Corbet Company should not charge the 10 and the 15 per cent on invoices 296, 305 and 306. It would appear that Tromble by his said letter protested against those charges and enclosed his check for $361.45, which was the amount owing on said invoices if the said 10 and 15 per cent were disallowed. To said letter no reply seems to have been made, and I take the silence of the Hills-Corbet Company to be acquiescence in the claim made by Tromble in said letter.)

As to the $831.25, being 10 per cent on the amount expended by the Craig Lumber Company for labor at the instance of the Hills-Corbet Company; I think that Hills-Corbet Company is entitled to charge that 10 per cent, on account of the fact that the contract itself says that they shall be entitled to 10 per cent on the labor. The Hills-Corbet Company did not do the work, it is true, but the Craig Lumber Company did it for them, and the situation would be the same as if some one else had done it for them as their agent it would not make any difference who did the work, for the stipulation in the contract for the 10 per cent on labor is not so conditioned. The Craig Lumber Company, having done the work, are, of course, entitled to be credited with the amount that they expended for the work. [67]

So far as the item of board is concerned: I find that the testimony of Mr. Corbet to the effect that

Tromble agreed that the Craig Lumber Company would board the men, assuming indebtedness therefor, is absolutely undisputed. Mr. Humfrey, the bookkeeper for the Craig Lumber Company testified that he made the entries against the Hills-Corbet Company on this item without any knowledge that the same was a proper charge. Humfrey came into service of the company after the board was furnished, and he knew nothing of the circumstances.

BALANCE DUE FROM CRAIG LUMBER COMPANY TO HILLS-CORBET COMPANY.

The invoices under the contract amount to $31,708.49, and the 10 per cent on labor amounted to $831.25; the invoices for extras amounted to $5,958.79, and the sum of these amounts is $38,498.53; but under the contract the mill was to be built and installed for $32,125, therefore we are obliged to take the latter sum ($32,125) as being the "invoices under the contract and 10 per cent on labor." Now, this sum of $32,125 added to the $5,958.79 for extras, amounts to $38,083.79. As against this sum the following payments have been made:

December 8, 1917	$ 4,020.44
December 17, 1917	3,812.23
January 24, 1918, Credit memo.	11.56
February 1, 1918	4,461.63
February 20, 1918	276.51
March 5, 1918	361.45
March 18, 1918	5,000.00
July 19, 1918	1,000.00
December 8, 1918	1,000.00
Making a total of	$19,943.82

In addition to this sum the Craig Lumber Company is entitled to credit for $8,312.58, which it paid out for labor for the Hills-Corbet Company under the contract, making a total sum to which the Craig Lumber Company is entitled to credit of $28,256.40. Deducting this sum ($28,256.40) from the larger sum ($38,083.79) would leave due to Hills-Corbet Company $9,827.39.

The question now is whether or not any part of this $9,827.39 due is on account of the liability incurred under the contract. The answer to that is this:

The liability under the contract and the liability for the extras constitute the *entire* liability incurred by the Craig Lumber Company, [68] the liability for extras being only $5,958.79 and the total amount being due $9,827.39, at least the difference between these two sums must perforce be due under the contract. By the terms of the contract the title to the machinery mentioned therein was not to pass until the payments under the contract had been made. I have no difficulty in construing such an agreement to be a conditional bill of sale. It is true that in one sense of the word it is security for the performance of a contract, but after all, that is the impelling motive for all conditional bills of sale. As, therefore, the machinery has not been paid for and the title was not to pass until it was paid for, I think the Hills-Corbet Company are entitled to possession of the machinery.

The next question is whether or not the machinery was so attached to the realty as to become

a permanent part thereof, that is to say, a fixture, and whether or not the mortgage to the bank creates such a lien upon the property as to supersede the force and effect of the conditional bill of sale.

And, first, considering the fact that the sawmill itself is constructed on piles on the tide-land, within a forest reservation, and to which no one had any title except the Government of the United States, I think it is a matter of grave doubt whether there is any realty to be considered at all; but pretermitting that question, I can see nothing in the evidence at all militating against the idea that the machinery could be easily moved from the said mill without damaging the building in any way whatsoever,—it appears to have been attached by bolts and screws which could easily be unfastened. The Court says in Holt v. Hanley, 232 U. S. 367, in a case somewhat similar to the case at bar:

> "The system was attached to the freehold but it could be removed without any serious harm for which complaint could be made other than the loss of the system itself. * * * To hold the mere fact of annexing the system of the freehold over-rode the agreement that it should remain personalty but still belong to Holt, would be to give a mystic importance to attachment by bolts and screws."
>
> (See, also, Detroit Steel Cooperage Co. v. Sisterville Brewing Co., 233 U. S. 712.)

Second, the machinery did not pass under the "after-acquired" clause of the mortgage for the reason that the mortgagor never did "acquire"

such machinery, the title never having passed.

Let formal findings be prepared in accordance herewith. [69]

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Apr. 17, 1920. J. W. Bell, Clerk. By ————, Deputy. [70]

In the District Court for the District of Alaska, Division No. One, at Ketchikan.

In the Matter of the CRAIG LUMBER COMPANY,

Bankrupt.

HILLS-CORBET COMPANY,

Petitioner,

vs.

E. L. COBB, Trustee, and BANK OF WRANGELL,

Respondents.

Supplemental Opinion.

Since the 17th day of April, 1920, when the Court rendered an opinion in this case on the main question as to whether or not the invoices covered by the conditional bill of sale had been fully paid for, the attention of the Court has been brought to the fact that by the stipulation and bond filed herein the Court should make a finding as to how much is due on the contract as distinguished from the amount

due on extras, and from a consideration of the evidence the Court reaches the following conclusion:

The payments made were as follows:

	On Contract.	On Extras.
Payments applied by debtor, as shown by Plaintiff's Exhibit "E"	$ 3334.87	477.36*
*(Being for fares of men from Seattle.)		
Payments applied by the debtor, as shown by Plaintiff's Exhibit "G"	210.16	66.35
Payments applied by the debtor, as shown by Plaintiff's Exhibit "H"	35.99	421.26**
**(This amount is arrived at by virtue of the fact that the Court has disallowed the claim of Hills-Corbet Company for 10 per cent and 15 per cent on vouchers Nos. 296, 305 and 306, as stated in main opinion.)		
Making the total payments applied by the debtor	$3581.02	$964.97

[71]

Forward	$ 3581.02	$ 964.97
Payments applied on contract as per testimony of Mr. Corbet	4020.44	
	4461.63	
(Credit memorandum)	11.56	
Making a total payment of	12074.65	964.97
In addition to the above, the amount paid out by the Craig Lumber Company for Labor must be apportioned. *T* take the apportionment made by Mr. Cloudy, as shown in Exhibit "O." His testimony seems reasonable to me, and there is nothing in the evidence to contradict it. The total amount of labor was $8312.58, apportioned by said exhibit "O"	5214.34	3098.24
Making a total payment of	17288.99	4063.21

	On Contract.	On Extras.
The contract price was	$32,125.00	
The total for extras was (including the $95.80 for which credit has already been given the Craig Lumber Company		$6054.59
Deducting the payments made, as shown above.	17,288.99	4063.21
Leaves a remainder due of	$14,836.01	$ 1991.38

There is $7000 which the debtor did not specifically apply, being payments made on March 18, July 19, and December 8, 1918, for $5000, $1000 and $1000 respectively.

In the absence of any application by the debtor, I think the payments should be applied, first, to the balance due extras because that amount is unsecured; and after deducting from the said $7000 the amount thus apportioned to the extras, the remainder should be applied in reduction of the sum due on the contract.

Now, the sum due on the extras was $1991.38: Applying that amount leaves $5008.62 to be applied in reduction of the sum due on the contract, which, as we have seen, is $14,836.01. Making the application aforesaid, the remainder due on the contract is found to be $9827.39.

Let the above be incorporated in the findings.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Apr. 25, 1920. J. W. Bell, Clerk. By ————, Deputy. [72]

In the District Court for the District of Alaska, Division No. One, at Juneau.

No. 1964–A.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

HILLS–CORBET COMPANY,

Petitioner,

vs.

E. L. COBB,

Trustee.

Bill of Exceptions.

BE IT REMEMBERED that on the trial of the above matter the following proceedings were had, to wit:

Filed in the District Court, District of Alaska, First Division. Jul. 20, 1920. J. W. Bell, Clerk. By ————, Deputy. [73]

INDEX.

[74]

Testimony of W. W. Corbet, for Petitioner.

W. W. CORBET, introduced as a witness on behalf of the petitioner, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELSELL.)

Q. You are Mr. W. W. Corbet? A. Yes.

Q. Of Seattle. You and Mr. Fred R. Hills comprise the Hills-Corbet Company? A. Yes.

Q. It is a copartnership? A. Yes, sir.

Q. And that was true on October 31, 1917?

A. Yes.

Q. When this contract was signed? A. Yes.

Q. You and your company, the Hills-Corbet Company, entered into a contract with the Craig Lumber Company, did you not? A. Yes.

Q. I hand you this document and ask you what it is?

A. This is the agreement that we drew up and signed with the Craig Lumber Company.

Q. That was signed by you? A. Yes.

Q. For the Hills-Corbet Company? A. Yes.

Q. Signed by Mr. Tromble? A. Yes.

Q. For the Craig Lumber Company,—Tromble was at that time president of the Craig Lumber Company, was he? A. Yes.

Mr. COBB.—Don't lead your witness.

Q. Have you a copy of the blue-print of the plant referred to in this contract? A. Yes. [75—1]

(Testimony of W. W. Corbet.)

Q. Get it for me, please. (Witness hands paper to counsel.) That is the blue-print to which the contract refers, is it? A. Yes.

Mr. HELSELL.—We will offer the two together in evidence, if the Court please.

Mr. COBB.—Is this the original, of which you have a copy attached?

Mr. HELSELL.—Yes, that is the original.

Mr. COBB.—There is no objection to it except the same one that was made to the complaint, that this shows upon its face it is not a conditional sale.

The COURT.—It will be overruled.

(Whereupon said blue-print and contract was received in evidence and marked Plaintiff's Exhibit "A," which is identical with exhibits attached to the petition.)

Q. Pursuant to that contract, Mr. Corbet, did your company commence to ship machinery to Alaska? A. Yes.

Q. About the time of the contract?

A. Soon after that.

Q. Now, in your office there in Seattle you kept some record of the machinery you shipped and the cost of the same, did you not? A. Yes.

Q. What record did you keep?

A. Well, we had an order sheet on which we put down the machinery and kept that on file, and then any expenses incurred in connection with that particular machinery we entered on that file until it was complete for that machinery; then we made out an invoice for that machinery, including all the

(Testimony of W. W. Corbet.)

expenses, as it was delivered at the dock, and entered that then in our journal, sending the Craig Lumber Company the invoice.

Q. The original memorandum which you kept of the machinery and the cost to you was entered first on that order sheet? A. Yes.

Q. I show you a paper and ask you what that is?

A. This is the original order sheet on which we entered the cost [76—2] of the machinery to us; to that we added 15 per cent and the 10 per cent, which constituted the cost of the machinery to the Craig Lumber Company; then we made out to them an invoice, of which this is a carbon copy, sending them the original of this. This was the original filed.

The COURT.—What do you mean by this?

The WITNESS.—The white sheet is the original record of the cost of the machine to us; we were to charge them, you see, with the actual cost to us, plus 15 per cent, plus 10 per cent, which we added on to this; then we made out to them on our regular invoice forms an invoice that we sent to them, which was a copy of this.

The COURT.—That is the yellow sheet?

The WITNESS.—No, this is just the carbon copy of the original—they have the original of this.

Q. In other words, the yellow sheet is a carbon copy of your invoice for that particular machinery sent by you to the Craig Lumber Company?

A. Yes.

Q. And the white sheet is the order sheet, which

(Testimony of W. W. Corbet.)

is a part of the records of your office?

A. That is the original record of the cost.

Mr. HELSELL.—Now, I have attached one carbon copy of the invoice to the order sheet, which really one is just a duplicate of the other, and I am willing to introduce them just this way.

Q. (By Mr. HELSELL.) Do the amounts on this order sheet, No. 231, represent the actual cost to you? A. It does.

Q. And it was shipped to the Craig Lumber Company, Craig, Alaska? A. Yes.

Q. On or about the date of the invoice?

A. Yes.

Mr. HELSELL.—I offer it in evidence.

Mr. COBB.—No objection. [77—3]

(Whereupon said invoice was received in evidence and marked Plaintiff's Exhibit "B.")

Q. This Exhibit "B" is invoice No. 231, for one Berlin resaw. I hand you another paper and ask you what that is?

A. That is a copy of the invoice sent them—some passenger fares of some of the men—boat fares.

Q. Passenger fares of whom?

A. Of some of the workmen that went to Craig from Seattle.

Q. Some of your crew that you sent up?

A. Yes.

Q. Give the stenographer the amount of it.

A. $477.36.

Q. That was the actual cost to you? A. Yes.

Q. And on the back here are the checks with

(Testimony of W. W. Corbet.)

which they were paid, is that right? A. Yes.

The COURT.—There is not 10 per cent and 15 per cent on that?

Mr. HELSELL.—No, sir. That is something the company was supposed to pay, and which they did pay, in fact.

The COURT.—Is that covered by your contract?

Mr. HELSELL.—No; but we have to carry both the things that are out of the contract and those that are in it, because the payments were all made generally, and unless we carry all the debits we cannot show what the payments were for. The payments came in, and included these extras and the items on the contract, therefore we have to carry all of the debit items too.

Mr. COBB.—We object to this,—it isn't any machinery, and has no relation to any machinery that they say was furnished under this contract or conditional sale.

Mr. HELSELL.—The reason, if the Court please, why I have put this in and showed a debit to the Craig Lumber Company is that in one of their checks which we have included in our bill of particulars this was included in their payment, so in order to segregate [78—4] and find out what that check was in payment of, I have to put in what we debited them with.

The COURT.—Do you intend to segregate them before you get through?

Mr. HELSELL.—Yes, sir; I intend to show you before I get through how much was applied by the

(Testimony of W. W. Corbet.)

Company as extras and how much was applied on the contract.

The COURT.—The objection will be overruled on that statement.

Mr. COBB.—Note an exception to it, and let the exception apply to all of them,—I suppose there will be a great many more—without repeating it.

(Whereupon said invoice was received in evidence and marked Plaintiff's Exhibit "C.")

Mr. HELSELL.—I show you your order sheet No. 223, and ask you what that is?

A. This is an invoice,—you want me to tell you what it is for?

Q. You don't need to go into details—just read it.

A. For an Atlas engine and a Jewel engine, amount $1,204.91.

Q. Does that represent the actual cost to you of that merchandise? A. Yes.

Q. That was shipped to the Craig Lumber Company on or about the date of the invoice?

A. Yes.

Mr. COBB.—This item, $950.52, is that the cost of both engines?

Mr. HELSELL.—Yes, that includes the whole thing.

(Said invoice was received in evidence and marked Plantiff's Exhibit "D.")

Q. I will just ask you to read those items to the stenographer, and then I will ask you if your testi-

(Testimony of W. W. Corbet.)

mony is the same in regard to that so as to hasten this matter.

A. Frost engine—this was invoice No. 227—one Frost engine, $1,046.79.

Q. Your testimony in regard to that is the same?

A. Yes.

(Said invoice was received in evidence and marked Plaintiff's Exhibit "E.") [79—5]

Mr. HELSELL.—Can we expedite matters in some way?

Mr. COBB.—I was going to say, if I had an opportunity,—I gave you all my books, and if you had given me these we might expedite it very much.

Mr. HELSELL.—I would be very glad to have you look them all over.

(Whereupon a recess was had in order that counsel might examine vouchers.)

Mr. HELSELL.—If the Court please, at Mr. Cobb's request. I have segregated the invoices which we have marked extra and which we have marked on contract, and I think we can offer them in just two parcels. Is that all right with you?

Mr. COBB.—Yes, I think that will expedite matters a good deal. As I understand it, they are the originals from which you made up your bill of particulars?

Mr. HELSELL.—Yes.

The COURT.—Let the record show that the exhibits heretofore introduced are withdrawn and are attached to the bundle which is now being offered as one exhibit.

(Testimony of W. W. Corbet.)

Q. (By Mr. HELSELL.) Now, referring to the bundle of invoices and order sheets in your hand, they are invoices of the material shipped by the Hills-Corbet Company to the Craig Lumber Company and marked on our bill of particulars "on contract," are they not?

A. Yes, sir.

Q. They represent, you say, the cost to the Hills-Corbet Company of the particular item marked on the order sheet? A. Yes.

Q. And were shipped about the date of the invoice to the Craig Lumber Company, at Craig, Alaska.

A. Yes.

Mr. HELSELL.—I offer this whole bunch of order sheets in evidence as one exhibit.

The COURT.—What you heretofore said about the yellow sheet and the white sheet applies to this whole bunch?

The WITNESS.—Yes. [80—6]

(Whereupon said bunch of invoices was received in evidence and marked Plaintiff's Exhibit "B," and are identically as shown on bill of particulars as amended of goods marked "in contract.")

Q. That bundle which you now have in your hand represents the order sheets and the carbon copies of the invoices of all of the machinery and other goods that you shipped to the Craig Lumber Company and which is marked on your bill of particulars "extra"? A. Yes.

Q. Represents the actual cost to you? A. Yes.

Q. In some instances,—in most instances you

(Testimony of W. W. Corbet.)

charged your regular per cent on them, did you not?

A. Yes.

Q. And on the brick, the first one, on top, invoice No. 279, the brick and generator and other materials, you did not charge any percentage on them?

A. No.

Q. The prices on these represent the actual cost to you? A. Yes.

Q. And the property was shipped, as you stated, to Craig, Alaska? A. Yes.

Mr. HELSELL.—I offer these in evidence.

Mr. COBB.—I already have the objection in to these—they are what you term extras, not furnished under the contract?

Mr. HELSELL.—Yes.

Q. That represents what?

(Whereupon said invoices were received in evidence and marked Plaintiff's Exhibit "C," and are identically the same as shown on bill of particulars marked "extra.")

Q. Now, as to this order sheet No. 330, this is partly marked on contract and partly not, is it not, on your bill of particulars? A. Yes.

A. Our contract called for enough belt to run the mill. When we came to ship the belt they wanted enough extra to have on hand there—if anything went wrong they would have it there, and told us to ship up a quantity of belt sufficient not only to belt up the machinery, but to have extra on hand, so we sent [81—7] them this amount of belt. Part of it was used in the mill, which would be on the contract,

(Testimony of W. W. Corbet.)

and part of it was left there, as extra.

Q. As stock?

A. As stock, and we charged that up not on contract.

Q. This represents the actual cost to you of the belt? A. Yes.

Q. That was shipped by you to Alaska about the date of the invoice? A. Yes.

Q. It has attached to it, I believe, some memorandum made by Mr. Cloudy?

A. That was the amount of belt that was used on the machinery.

Mr. HELSELL.—I will take that off at this time. I now offer that in evidence.

(Whereupon said invoice was received in evidence and marked Plaintiff's Exhibit "D," and is identical with *with* invoice 330 on amended bill of particulars.)

Q. Now, coming to your first item of extras, brick, $1,614.63, why have you marked that extra?

A. The first shipment of brick that was sent up there was put on the dock and the dock broke and fell through. Mr. Tromble then wired us at once—

Mr. COBB.—We object—if you have the wire it is the best evidence.

Mr. HELSELL.—Never mind what he wired.

The WITNESS.—We sent up a duplicate of that order.

Q. (By Mr. HELSELL.) Did you receive this letter through the mail? A. Yes.

Q. Do you know whether that is Mr. Tromble's writing? A. Yes.

(Testimony of W. W. Corbet.)

Mr. HELSELL.—I offer this in evidence.

The COURT.—Who is Mr. Tromble?

Mr. HELSELL.—He was the manager of the Craig Lumber Company at that time,—president of it, I guess, was his right title.

Mr. COBB.—I object to this as irrelevant and immaterial, not an issue in the case. For what purpose do you offer it? [82—8]

Mr. HELSELL.—I offer it for this purpose: Mr. Tromble in that letter not only encloses a check which shows what he was paying—he enumerates the invoices,—he encloses a check and shows what he wants to apply the payments on—shows that he paid for one of the items of extras, which was the expense of men to Alaska; and he also tells in that letter about the brick falling into the water, and asking Hills-Corbet Company to reorder the same, and saying that all he will ask of them is that they waive their percentages on that, showing that he intended and expected to stand the loss of that; and furthermore, I will connect that up by showing that he did in fact pay one hundred per cent of the new shipment of brick by his next remittance.

Mr. COBB.—If that is the purpose of it, to alter this contract, I object to it because it is not within the issues made by the pleadings, and the further reason that there is no consideration shown for it.

The COURT.—It explains the extra, doesn't it?

Mr. HELSELL.—Yes.

Mr. COBB.—I understand they are offering it for the purpose of showing that this loss of what they

(Testimony of W. W. Corbet.)

claim was their property was assumed by the Craig Lumber Company.

The COURT.—The object of this, as I understand it, is pursuing your policy of segregating the invoices, and showing how much was for machinery and how much was for extras?

Mr. HELSELL.—Yes, sir.

The COURT.—The objection will be overruled.

Mr. COBB.—To which we except.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit "E.")

Q. With this letter, marked Plaintiff's Exhibit "E," you received the Craig Lumber Company's check in how much? A. $3,812.23.

Q. You sent a transfer truck to Craig, Alaska, which was not mentioned in your contract,—how did you come to do that? [83—9]

A. Mr. Tromble found that he needed it and ordered it.

Mr. COBB.—A what?

Mr. HELSELL.—A transfer truck—that is one of the extras here.

Q. Smokestack, you have marked extra,—why do you mark that extra?

A. It was a stack that was needed for the boiler that was already there, and they found they needed a new stack and ordered that.

Q. You sent a bathtub up there,—that wasn't in the contract, was it?

A. That was one ordered by Mr. Tromble for a house that he was fixing up.

(Testimony of W. W. Corbet.)

Q. This extra that you have marked under invoice 303, cartage on generator, $2.59, was that the generator you sent up? A. Yes.

Q. Now, you have an extra marked here, invoice 305, one high lead block,—did that have anything to do with your contract? A. Nothing whatever.

Q. What was it for, do you know?

A. For logging purposes.

Q. He simply requested you to purchase it and send it to him, did he? A. Yes.

Q. Invoice No. 296, for some boom chains—

A. That was also for logging purposes—had nothing to do with our contract.

Q. You purchased them and sent them to him?

A. Yes.

Q. You did that just as an accommodation to him?

A. Yes.

Q. Twenty-four cotton-top mattresses—of course, that had nothing to do with the contract?

A. That had nothing to do with the contract.

Q. You just simply sent them to him because he wanted them? A. Yes.

Q. This one piece of shafting you don't know much about, do you? A. No. [84—10]

Q. Mr. Cloudy will testify to that. 12 double-deck steel bunks.

A. Those had nothing to do with the contract.

Q. These air-tight stoves, and stove-pipe, invoice No. 328, had nothing to do with the contract?

A. No.

Q. You sent those up? A. Yes.

(Testimony of W. W. Corbet.)

Q. Now, coming to this belting which you shipped,—did you compute the amount of belting which went into the mill as distinguished from the amount that went into stock? A. Yes.

Q, Upon what information did you base it?

A. From the list that Mr. Cloudy made showing the amount that was used in the actual construction of the mill.

Q. Is Plaintiff's Exhibit "F" for identification the thing that you used? A. Yes.

Q. I will connect that up later by Mr. Cloudy. Did you compute from that how much belt was used in the mill and how much was for stock? A. Yes.

Q. How much? A. $611.39, was extra—stock.

Q. Was stock? A. Yes.

The COURT.—The amount in the mill is in the bill of particulars?

Mr. HELSELL.—The total is in my bill of particulars and I segregated it part on contract and part not on contract.

Q. These relayers, invoice 337, were not on contract? A. No.

Q. Did they have anything to do with the contract?

A. No.

Q. This pump, invoice 370, for $716.63, did that have anything to do with the contract?

A. No, that was extra. [85—11]

Q. This double-arm pulley, invoice No. 403, did that have anything to do with the contract?

A. No.

Q. You have charged as an extra here $18.47, under

(Testimony of W. W. Corbet.)

invoice No. 393, interest on $5,000 for 20 days at 7 per cent—what is that?

A. Mr. Tromble sent us a check and when I put it in the bank in Seattle it was sent to the bank at Wrangell to be paid, and the Craig Lumber Company had no funds there so they held it for 20 days before it was paid—the interest on it was charged to the bank at Seattle, and they charged it to us.

Q. In other words, that really should be deducted from his payments instead of charged as material furnished? A. Yes.

Q. Now, did you, on or about the date of that letter, receive the same through the mail? A. Yes.

Q. Is that the handwriting of Mr. Cloudy?

A. Yes.

Q. Did a check accompany that letter?

A. Yes.

Q. How much? A. $276.51.

Q. That is, two of them—two checks totaling that amount? A. Yes.

Mr. HELSELL.—I offer this in evidence to show—

The COURT.—Who is Mr. Cloudy?

The WITNESS.—He is the man that we sent up there to construct the mill and to take charge of it.

The COURT.—Is he your man?

The WITNESS.—He is our man who was handling our affairs there, but in order to take care of our interest he found it necessary also to handle the affairs of the Craig Lumber Company,—their man couldn't take care of the business very well, so it made it

(Testimony of W. W. Corbet.)

necessary for Mr. Cloudy to do a lot of their work. [86—12]

Mr. HELSELL.—That I am offering for the purpose simply of showing that he received a certain payment which was directed to be applied on certain invoices, and it was applied on those invoices.

Mr. COBB.—We object to it as irrelevant and immaterial.

The COURT.—I think it is material, but I cannot tell who Mr. Cloudy is—he was, it would seem, occupying a dual position.

Mr. HELSELL.—He was, if the Court please, disbursing the Craig Lumber Company's money as well as his own,—he had sort of full authority to go ahead, and when these invoices came in—it was the only occasion on which that occurred—he wrote a check and sent it to the Hills-Corbet Company in payment of those few invoices, and I want to show the application of those payments to those particular invoices because in certain instances they are extras.

The COURT.—The objection is overruled.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit "G.")

Q. Did you receive this letter through the mail?

A. Yes.

Q. About the date of the letter? A. Yes.

Q. Is that signed by Mr. Tromble?

A. Yes.

Mr. HELSELL.—I offer that in evidence. That is a letter enclosing checks in payment of certain invoices which were outside of the contract.

(Testimony of W. W. Corbet.)

The COURT.—Signed by whom?

Mr. HELSELL.—The manager of the Craig Lumber Company, Mr. Tromble.

Mr. COBB.—This applies to invoices 296, 305 and 306?

Mr. HELSELL.—Yes, sir.

Mr. COBB.—I will make the same objection to that.

The COURT.—The objection is overruled.

(Whereupon said letter was received in evidence and marked Plaintiff's Exhibit "H.") [87—13]

Q. Now, Mr. Corbet, if you will get your books of account, I want you to state to the Court what payments you received from the Craig Lumber Company. What was the first payment you received from the Craig Lumber Company?

A. On December 17th, $3,812.23.

Q. Is that the first one?

A. Yes,—no, December 8th was the first one.

Q. How much was that? A. $4,020.44.

Q. That was in payment of what,—what invoices, do you know?

A. No, I don't—cannot tell from this.

Q. It was 50 per cent of something?

A. That was 50 per cent of all the invoices dated November 15th and 27th.

Q. What was the next payment you received?

A. On December 17th, $3,812.23.

Q. And that was the check you referred to which accompanied this letter that you identified?

A. Yes.

Q. The next payment you received was how much?

(Testimony of W. W. Corbet.)

A. $4,461.63.

Q. Now, can you tell the Court in payment of what invoices that remittance was sent?

A. That was all the invoices dated January 23d, for the replacement of the brick and other things that fell into the water there, and half of all the invoices dated January 24th, less a credit of $11.56 for some stuff that was invoiced to them and wasn't sent.

Q. Well, was there one invoice of January 24th that was not included in that payment, the last one?

A. Yes; there was that one that wasn't included in that.

Q. And that check was in payment of one hundred per cent of the brick, invoice No. 279, generator, brick, etc.? A. Yes.

Q. And 50 per cent of all the invoices of January 24th, except [88—14] invoice No. 283?

A. Yes.

Q. Less a credit of $11.56. You already testified about receiving the check for $276.51 on February 20th, did you not? A. Yes.

Q. What is the next you received?

A. March 5th, $361.45.

Q. Now, up to that point the payments had been sent to you for particular invoices, had they not?

A. Yes.

Q. Now, what is your next payment?

A. March 18th, $5,000.00.

Q. Who paid you that $5,000? A. Mr. Tromble.

Q. Where? A. In Seattle.

Q. Did he make any,—give you any instructions as

(Testimony of W. W. Corbet.)

to what to apply that to? A. No.

Q. Just gave you $5,000 generally?

A. Gave us a check.

Q. When is your next payment?

A. On December 10th, $1,000.

Q. December,—you have overlooked one, haven't you,—July? A. July 19th, $1,000.00.

Q. Did he give you any instructions as to how to apply that check? A. No.

Q. When is your next payment?

A. On December 10th.

Q. 1918? A. 1918.

Q. How much? A. $1,000.00.

Q. Who gave you that money?

A. Why, that was paid to us through Mr. Gates,—it was paid to [89—15] Mr. Gates by Mr. Shattuck.

Q. Mr. Shattuck was then the—

A. He was then manager of the Craig Lumber Company,—at least he had charge of their affairs.

Q. Is that the last payment that you received?

A. Yes.

Q. Now, all of these articles of merchandise were shipped by you to the Craig Lumber Company, were they not? A. Yes.

Q. I notice some of these letters are signed by Mr. Tromble personally, but you were doing businss all that time with the Craig Lumber Company?

A. Yes.

The COURT.—You had no personal business with Mr. Tromble?

(Testimony of W. W. Corbet.)

The WITNESS.—No.

Mr. HELSELL.—Take the witness.

Cross-examination.

(By Mr. COBB.)

Q. Mr. Corbet, in what business was the Hills-Corbet Company engaged in 1917?

A. Selling sawmill machinery.

Q. You carried a stock of your own?

A. Yes, a small stock.

Q. You were also engaged in installing it, weren't you? A. Yes.

Q. Selling and installing? A. Yes.

Q. In carrying on that business, did you supply the machinery out of your own stock as a rule?

A. No.

Q. As a rule, then, when you got a contract such as has been introduced in evidence here with the Craig Lumber Company, you went out in the market and bought machinery to fulfill the contract?

A. Yes. [90—16]

Q. And you charged a percentage on that?

A. No; as a rule, we charged a given price for it.

Q. Yes, as a rule you charged a given price for it. Now, in this instance, the machinery that is mentioned in your petition here, did you have that on hand at the time the contract was made?

A. One or two machines.

Q. This sawmill machinery—

A. We had one or two of the machines on hand.

Q. Do you know what you had on hand?

A. I don't recall just now,—I think there was a

(Testimony of W. W. Corbet.)

saw, but I cannot tell just what else.

Q. A saw? A. Yes.

Q. Do you know which saw that was?

A. A Berlin re-saw.

Q. What have you got that priced at?

Mr. HELSELL.—It is the first item on the bill of particulars, Mr. Cobb.

Q. (By Mr. COBB.) One Berlin number 283 re-saw, $603.50. What other machinery besides did you have on hand—besides that?

A. I cannot tell you just now.

Q. How is that?

A. I cannot tell you just now.

Q. Did you have any to speak of?

A. Very little.

Q. Most of it you went out in the market and bought for the purpose of complying with this contract? A. Yes.

Q. And you charged first 15 per cent working expense on that, and the 10 per cent profit? A. Yes.

Q. Now, under this contract the Hills-Corbet Company obligated itself that the mill as completed should not exceed $32,125.00 cost; is that right?

A. Yes, $32,125.00. [91—17]

Q. $32,125.00, that was to be the total cost?

A. Yes.

Q. That included the labor? A. Yes.

Q. And everything that entered into it. Now, the total of the invoices that you say you sent to them, on your bill of particulars here, under the contract was $31,780.40,—what does that represent?

(Testimony of W. W. Corbet.)

A. That represents the cost of the machinery at Seattle.

Q. Anything else?

A. With our profit added to it.

Q. That has your profits added to it? A. Yes.

Q. That has first 15 per cent added to it and then 10 per cent?

A. That 15 per cent is part of the cost.

Q. That is your operating expenses in Seattle?

A. Yes.

Q. Covered by an estimate of that much. Does that include any labor? A. No.

Q. Doesn't include any of the work at the mill?

A. No.

Q. Installing it? A. No.

Q. Now, I see under the contract you were to install that at your own expense at the mill?

A. Yes.

Q. Pay for the labor? A. Yes.

Q. Now, did you send them any money to pay those laborers? A. No.

Q. How was that labor taken care of?

A. The Craig Lumber Company was to pay that.

Q. And whatever they paid was to be credited on the cost of the mill to them by you? [92—18]

A. Yes.

Q. That was the arrangement?

A. The arrangement was that we were to send them bills at the end of each month for all the labor and they were to pay that.

Q. And that was to be credited on the $32,125.00?

(Testimony of W. W. Corbet.)

A. Yes.

Q. Because you had obligated yourselves to pay that? A. Yes.

Q. That arrangement was simply made for convenience. I see here that you put in a credit to the Craig Lumber Company for $6,443.76 for labor paid by them—that entered into part of the cost of the mill, did it? A. Yes.

Q. Now, you have mentioned these extras that were sent when ordered—you also charged the 15 and the 10 per cent on those, too?

A. Why, in the arrangement we made with Mr. Tromble we said we would charge for extras just as we had arranged to do in the contract—instead of charging an arbitrary price we would furnish him all the extras he needed there in the construction of the mill on the same terms as the other machinery.

Q. And so that was done? A. Yes.

Q. Did you keep any books down there at all other than these documents you sent in?

A. We had books; yes.

Q. What books?

A. Journal, cash-book and ledger.

Q. Have you got those books with you?

A. Yes.

Q. Let's see them. A. Here is the journal.

Q. Now, in keeping your books you just kept a general account with the Craig Lumber Company?

A. Yes. [93—19]

Q. Didn't make any distinction in charges and credits there at all, whether it was on the contract

(Testimony of W. W. Corbet.)

or anything else? A. No.

Q. It was kept as a general account? A. Yes.

Q. That is the way your books were kept and the business run? A. Yes.

Q. And at the time that you bought all of this machinery, except that re-saw that you have mentioned, you bought it for the purpose of sending it to Craig to comply with your contract with the Craig Lumber Company? A. Yes.

Q. Now, I am going to ask the indulgence of the Court,—it may not be proper cross-examination, but I think the Court realizes the position I am in as attorney for the trustee—I know nothing about this, and I want to examine Mr. Corbet. I have given him full opportunity to examine these books and I want to ask about certain items on these books—I have called attention to these, isn't that correct?

Mr. CORBET.—I think so.

Mr. HELSELL.—What is correct?

Mr. COBB.—That I gave him full access to them.

Mr. HELSELL.—Oh, yes.

Q. (By Mr. COBB.) Under date of September 30th, journal page 30, there is a charge against you by the Craig Lumber Company of $1745.00—were you ever able to find out anything about that? Referring to the journal and the items in connection with it, can you ascertain anything about what that charge was for—whether it was correct or not?

Mr. HELSELL.—Read what is in the journal.

Mr. COBB.—Hills-Corbet Company (Cloudy), list of checks paid June 13, 1918, $100.00.

(Testimony of W. W. Corbet.)

The WITNESS.—I have no record of that at all.

Mr. HELSELL.—You don't know what that is?

The WITNESS.—I don't know anything about that. [94—20]

Q. (By Mr. COBB.) You know nothing of that at all? A. No.

Q. $1745.00—maybe Mr. Cloudy may be able to explain it. I know nothing about it, of course. Now, I hand you a check dated January 5, 1918, payable to the Hills-Corbet Company by F. A. Cloudy, and ask you if you know anything about that —what it was given for?

A. Why, I suppose that is a check—

Mr. HELSELL.—He asked you if you knew—don't conjecture.

A. I don't know anything about it personally. Mr. Cloudy can explain that.

Q. (By Mr. COBB.) You don't know anything about that personally? A. No.

Q. Do you know anything about it from any of your business associates who were handling this business for you? A. No.

Q. Or anybody that was employed by you?

A. I was told by Mr. Cloudy what it was for.

Q. Mr. Cloudy handled it, did he? A. Yes.

Q. As your agent? A. Yes.

Q. What was it for then?

Mr. HELSELL.—Do you want him to give hearsay testimony?

Mr. COBB.—Gotten from his agent.

(Testimony of W. W. Corbet.)

Mr. HELSELL.—You never saw the check before, did you?

The WITNESS.—Never did.

Mr. HELSELL.—I object to him telling something that Mr. Cloudy told him about it. Mr. Cloudy is right here to explain it himself,—he does not know that that is the same check.

The COURT.—I think you had better put Mr. Cloudy on the stand for that.

Mr. COBB.—Very well, I won't cross-examine on this any further.

Q. (By Mr. COBB.) Now, in your bill of particulars here you have the company credited with $19,943.82 cash, and you have given [95—21] the items in it,—you don't mean the Court to understand that that is all the money the Craig Lumber Company has paid for the construction of that mill under this contract?

A. That is all the cash that they have paid us.

Q. Is that all that they have paid on account of the contract?

A. That is the only cash they have paid us. In addition to that they have paid the labor.

Q. Taken care of that up there which you were under obligations to perform for them? A. Yes.

Q. Now, in your bill of particulars you claim a total balance here in your favor of $11,257.29, is there that much owing you?

A. I believe that has been reduced a little by the change that has been made in that.

Q. How much has it been reduced, and how?

(Testimony of W. W. Corbet.)

A. Why, the labor charges have been reduced.

Q. What is that?

A. The labor charge has been reduced some.

Q. The labor charges had not been made at that time—that is credits to the Craig Lumber Company for labor that they had paid that you didn't have at the time this bill was made up? A. Yes.

Mr. HELSELL.—The labor is credited in there—$6,443.76.

Mr. COBB.—I know, but he says there are other labor charges, as I understand, that have been credited since.

The WITNESS.—No, no other labor—that has been revised a little.

Q. Well, that balance, whatever it may be, is made up then of the entire charges on the contract and on the extras, and then the entire credits that you have given to the Craig Lumber Company?

A. Yes.

Q. In other words, it is a balance struck on this whole account, which includes everything?

A. Yes.

Q. You don't know how much of that is due on the purchase price of [96—22] the machinery, do you? A. I don't know just now; no.

Q. Nor how much of it is due on the extras. Now, then, some of these extras that you have charged there were to replace certain articles that were furnished under contract and were lost when the dock went down? A. Yes.

Q. And the items that were lost at that time are

(Testimony of W. W. Corbet.)

also charged in there to the Craig Lumber Company, are they? A. Yes.

Q. So that those items called for in the contract are duplicated—once as under the contract and once as extras? A. Yes; those extras were paid for.

Q. Yes, but they enter into the general account that is extras in this bill of particulars? A. Yes.

Mr. COBB.—That is all.

Redirect Examination.

(By Mr. HELSELL.)

Q. Just one question, Mr. Corbet—all of the machinery and other property bought by you and shipped to the Craig Lumber Company at Craig, Alaska, were bought by you in your own name in Seattle, were they not? A. Yes.

Q. On your own money? A. Yes.

Q. You pledged your own credit? A. Yes.

Q. And they were charged to you? A. Yes.

Mr. HELSELL.—That is all.

(Witness excused.) [97—23]

Testimony of F. A. Cloudy, for Petitioner.

F. A. CLOUDY, introduced as a witness on behalf of the petitioner, being first duly sworn to tell the truth, the whole truth and nothing but the truth, testified as follows:

Direct Examination.

(By Mr. HELSELL.)

Q. Mr. Cloudy, your name is F. A. Cloudy?

A. Yes, sir.

Q. What is your business?

(Testimony of F. A. Cloudy.)

A. Directing engineer.

Q. Have you been familiar for some years with the sawmill business? A. Yes, sir.

Q. You were employed, were you not, by the Hills-Corbet Company to install the machinery for the Craig Lumber Company? A. Yes, sir.

Q. Did you take a crew of men from Seattle, Washington, to Craig, Alaska, for the purpose of installing that machinery? A. Yes, sir.

Q. About when did you arrive in Craig, Alaska?

A. About the 2d of December, 1917.

Q. Now, you had a copy of that blue-print with you, did you? A. I did.

Q. I will show you the blue-print attached to Plaintiff's Exhibit "A," and ask you if this is the blue-print a copy of which you had? A. Yes, sir.

Q. Will you explain to the Judge in general what work you had to do under that contract? Just explain the meaning of this blue-print as well as you can.

A. Under the terms of the contract,—this is the line of the old building—that line indicates the old building—also this dotted line here is part of the old building, and this dotted line is part of the old building; and under the terms of the contract we were to extend that building 20 feet in length, and 32 feet 6, 25 feet 3, and 18 feet 6 in width.

Q. Were you to build a planing mill? [98—24]

A. Yes; 18 feet 6 by 59 feet 6, comprised the planing-mill.

Q. Were you to build a dry kiln?

(Testimony of F. A. Cloudy.)

A. We were to build a dry kiln 104 feet no inches long, by 21 feet no inches wide.

Q. Were you to build a boiler-house?

A. The boiler-house, 18 feet,—

Q. Never mind the dimensions,—show the Judge where it is. A. Right here.

Q. And you were to install certain machinery inside of the buildings? A. Yes, sir.

Mr. HELSELL.—Now, laying that aside for a minute,—the blue-print, I might say, calls for the erection of the buildings above the foundations, and so does the contract,—the contract says that the purchaser, or the Craig Lumber Company, has to drive the foundations—the pile foundations, and furnish the piles.

Q. When you got there did you find any foundations laid?

A. No new foundations. The only foundation that was laid would be the foundation under the 20-foot extension to the old sawmill building.

Q. Did you find any lumber there for you to do business with? A. Practically none.

Q. Who was there when you got there, representing the Craig Lumber Company?

A. Mr. F. J. Tromble.

Q. Did he give you any instructions after you arrived there as to what he wanted done?

A. Yes, he did.

Q. Did he make any changes in the plans?

A. Yes.

Q. What were they?

(Testimony of F. A. Cloudy.)

Mr. COBB.—I object to that—there is nothing of that kind in the pleadings.

Mr. HELSELL.—We show the amount of labor that is chargeable to us, [99—25] and we have a right to show how we arrived at that sum.

The COURT.—Yes, I think so, Mr. Cobb, if the changes were made under the direction of the Craig Lumber Company.

A. Yes, he did.

Q. What changes did he direct you to make?

A. He wanted the roof raised over the entire building—to make one roof cover both the planing-mill and the sawmill.

The COURT.—What part of your claim is this going to refer to,—the labor part of it?

Mr. HELSELL.—Yes, the labor—to show what labor was done that was not under the contract.

Q. You might explain to the Court what he wanted you to do, and what you did do in the way of building an entire new roof over the mill.

A. The old building was about 32 feet high at the peak, and at the eaves where the sawmill property terminated and the planing-mill would start it was 8 feet above the platform or floor, then the planing-mill roof would be flat,—he said he would rather have it all under one roof, and that would give him a stretch over the planing-mill for box shooks and also over this end of the sawmill.

Q. I show you a little sketch—did you prepare that? A. I did.

Q. Does that indicate what you actually did do?

(Testimony of F. A. Cloudy.)

A. Yes, sir.

Q. You give the line of the present roof, and then the line of the raised roof? A. Yes, sir.

Q. And you ran it clear over until it went across and covered the planing-mill? A. Yes, sir.

Mr. HELSELL.—I offer that in evidence for the purpose of illustrating his testimony.

Mr. COBB.—When did you make this? [100—26]

The WITNESS.—Along about the first week in December, 1917.

Mr. COBB.—This plat?

The WITNESS.—Yes.

(Whereupon, there being no objection, said sketch was received in evidence and marked Plaintiff's Exhibit "I.")

Q. What other changes did Mr. Tromble order?

A. Changes in the engine foundation.

Q. What changes did that consist of, in the engine foundation?

A. I think he wanted the engine set on a concrete foundation, and we were to build the foundations of wood.

Q. Just state to the Judge in general the classes of work that you had to do that were not under the contract.

Mr. COBB.—I object to that as calling for a conclusion of the witness. Let him say what was done, and it is for the Court to say whether it was under the contract or not.

Mr. HELSELL.—He can state his opinion—the

(Testimony of F. A. Cloudy.)

Court does not need to follow it unless the Court takes the same view of the contract that he does. He can give his opinion of what labor was not under the contract, and the Judge can follow it or not, as he sees fit.

The COURT.—No, I do not think so,—let him tell what he did.

Mr. HELSELL.—As long as the Court knows my purpose in getting at it, that is all there is to it.

Q. What different kinds of work did you have to do when you arrived there?

A. The first thing I had to do was to take some men and re-construct a bunkhouse and the dining-room attached to the bunkhouse, then had to saw lumber, and repile a lot of lumber that was in the way, that I had to move before I could take care of the new lumber, clear off platforms of snow, saw wood for the cookhouse, lay piping for the cookhouse, and had to take charge of the crew in the cookhouse.

Q. Go ahead—what about the foundations?

A. For the foundations, had to clear off ground, remove snow, clear the ground, excavate for mud sills, strengthen up the [101—27] foundation under the mill that had been knocked out by drift logs.

Q. Did Mr. Tromble, the manager or president of the Craig Lumber Company, have no crew there at all? A. He had no men there at all.

Q. So you had to do with your own crew practically all the work—

Mr. COBB.—I object to your leading,—let him state what he did.

(Testimony of F. A. Cloudy.)

Q. Did your crew, then, do all the work that was done there? A. They did.

Q. And did you keep a record of the time of your men, and keep track of the various kinds of work which they did? A. I did.

Q. Now, I will show you a package of time sheets and ask you what they are.

A. They are the time sheets kept by myself of the men.

Q. Of the men of your crew? A. Yes, sir.

Mr. HELSELL.—I will offer them in evidence.

Q. (By Mr. HELSELL.) What period of time do these sheets cover?

A. Part of November and December, 1917.

Q. These were kept by you and were classified according to the different kinds of labor that they did?

A. Yes, sir.

Q. And you carry the rate of pay and everything right here? A. Yes.

Mr. HELSELL.—I offer them in evidence as one exhibit.

(Whereupon, there being no objection, the said sheets were received in evidence and marked Plaintiff's Exhibit "J.")

Q. What is this, Mr. Cloudy? (Handing book to witness.)

A. It is a time book which I kept.

Q. That shows the time from when to when?

A. January, 1918, to April, 1918.

Q. Four months in 1918? A. Yes, sir.

Q. January to April, inclusive?

(Testimony of F. A. Cloudy.)

A. Yes, sir. [102—28]

Q. That shows the time of your crew of men that you brought up there? A. Yes.

Q. And the rate of pay?

A. And the rate of pay; yes, sir.

Q. So that from this book can be segregated the various classes of labor which they worked upon?

A. Yes, sir.

Mr. HELSELL.—I offer this in evidence.

Mr. COBB.—All right.

(Whereupon said book was received in evidence and marked Plaintiff's Exhibit "K.")

Q. Referring to this time-book, Exhibit "K," you have in little initials the various kinds of work—S. M., etc.? A. Yes, sir.

Q. And you have in the back of the book the key to that, have you not? A. Yes, sir.

Q. And when you say in your time-book, or on your time-cards, sawmill, what do you mean—what kind of work was that?

A. That was work in the sawmill cutting lumber.

Q. Cutting lumber? A. Yes, sir.

Q. And when you use the term "Shoveling snow," where was that work done, and what was it for?

A. Out in front of the mill, shoveling snow to make room for the lumber, and shoveling it from the ground before starting the work on the foundation.

Q. Getting it cleared? A. Yes, sir.

Q. Wood for cook-house—of course that speaks

(Testimony of F. A. Cloudy.)

for itself. Brick from Revilla, what does that mean?

A. I had my crew longshoring, in other words, taking the brick and cargo from the ship's sling and storing it on the dock. [103—29]

Q. Removing boilers, what does that include?

A. Taking the boilers from the dock to the mill property.

Q. Sort of hauling them from the end of the dock where you took them off the ship to the site of the mill? A. Yes, sir.

Q. Dry kiln foundation, what was that?

A. That was work on the dry kiln foundation.

Q. What did it consist of?

A. Excavating for mudsills, laying of the mudsills and the floor sills.

Q. Removing lumber?

A. That was labor necessary to remove lumber from the proposed site of the dry kiln,—they had piled lumber there and it had to be moved.

Q. Water-pipe, and replacing,—what is that?

A. That was after a heavy frost, we had to take out the pipe, connected from Lindenburger's cannery—the pipe-line to the cookhouse of the Craig Lumber Company froze up, and we had to take it out and replace it.

Q. Now, you have a general item called mill roof, what does that include?

A. That is work on the mill roof, putting on sheathing—rafters and sheathing.

Q. And also includes raising the roof, does it?

(Testimony of F. A. Cloudy.)

A. In part, yes, sir.

Q. Then you have another item, called clearing platform; what does that include?

A. That was a job clearing the platform to make room for the extension in front of the sawmill—lumber piled up there promiscuously.

Q. Moving engine, what does that mean?

A. That was removing engine from the dock to the mill site.

Q. Then you have an item here called lumber order, what does that mean?

A. They had one of my men filling an order of lumber that was [104—30] sold to a customer of the Craig Lumber Company.

Q. You have an item here removing machinery from dock—that speaks for itself, I suppose?

A. Yes, sir; from the dock to the site of the mill.

Q. From the ship's sling to the mill site?

A. No; it was unloaded on the dock—that was some machinery that had arrived before I did.

Q. I see you have here an item marked gravel, what is that—sand and gravel—include those two together.

A. That is for shoveling gravel aboard the scow and then unloading at the mill site.

Q. What was that gravel for?

A. Engine foundations.

Q. Removing engine?

A. That is another engine—there were two engines—from the dock to the mill site.

Q. You have an item here called mill foundation?

(Testimony of F. A. Cloudy.)

A. That was an item I spoke of a while ago where a drift log had knocked out some foundation under the old mill, which it was necessary for us to replace.

Q. You have an item here called boiler-house foundation—what was that?

A. That was work necessary to clear the ground and remove an old tank, and a lot of old wood that was burned up—necessary for the foundation of the boiler-house.

Q. You have an item called tearing down sawmill—what is that?

A. That is tearing out the old building after the new building had been erected over it.

Q. The old roof, you mean?

A. The old roof and some of the superstructures.

Q. You have an item here, papering mill roof?

A. That was applying the paper covering.

Q. I see, and the mill roof proper would be labor on the mill roof? A. Yes, sir. [105—31]

Q. Trussing mill,—you have an item called trussing mill, what is that?

A. That is after the mill was partially completed Mr. Tromble decided that he would like to have a plate or beam—cords, we call them, directly over the sawmill deck and carriage raise, to enable them to take larger logs into the mill,—some of the logs were 10 feet in diameter.

Q. I show you a little sketch—what is that?

A. It is a sketch I gave my millwright or car-

(Testimony of F. A. Cloudy.)

penter to work from in raising the cords, to allow them to get those logs in.

Q. That shows what you did in trussing the mill?

A. Yes, sir.

Mr. HELSELL.—I offer that in evidence.

Mr. COBB.—For what purpose?

Mr. HELSELL.—Why, this is extra labor that was not called for by the contract.

Mr. COBB.—I don't know whether it is or not. You haven't proved it.

Mr. HELSELL.—He testified to it—that Mr. Tromble ordered it.

The COURT.—It will be admitted as illustrating the witness' testimony.

(Whereupon said sketch was received in evidence and marked Plaintiff's Exhibit "L.")

Q. You have an item marked carriage—what is that?

A. It was necessary to overhaul the carriage. We were not to do any work on the carriage, but the carriage was in a dilipidated condition, and he asked to have it overhauled, so I did so.

Q. You say he did, you mean Tromble?

A. Yes, sir.

Q. You have an item here marked logging, what is that?

A. That was some logs that were removed from the site of the dry kiln.

Q. To clear a floor space? A. A clear area.

Q. You have an item marked Stevens' residence, what is that?

(Testimony of F. A. Cloudy.)

A. That was some work necessary to be done at Henry Stevens' residence, an uncle of Mr. Tromble's. [106—32]

Q. Had that anything to do with the Craig Lumber Company—did the Craig Lumber Company own his residence? A. No.

Q. Mr. Tromble ordered the work done?

A. Ordered the work done.

Q. Pipe-line to cookhouse, what is that?

A. Reconstructing after another heavy frost.

Q. You have an item here marked brick shed?

A. Constructing a shed over the brick on the dock.

Q. You have an item here called log slip, what is that?

A. Building a log slip to the mill from the pond.

Q. You have an item here called log pond, what is that?

A. Arranging boom sticks and dolphin piles on the pond for receiving logs.

Q. You have an item called water-tank, what is that?

A. Erecting a water-tank in connection with the mill, for storage.

Q. Were all of these items of labor done at anybody's request? A. Tromble's.

Q. He ordered them, did he? A. Yes, sir.

Q. Tell the Court why it was necessary to reorder all the brick and a new generator.

A. Why, the first shipment broke the dock and fell into the water.

(Testimony of F. A. Cloudy.)

Q. At Craig, Alaska?

A. At Craig; yes, sir.

Q. Whose dock was it on?

A. It was on the Company's.

Q. Why did it fall into the water?

Mr. COBB.—I object to that as irrelevant and immaterial, why it fell into the water—it isn't a damage suit.

Mr. HELSELL.—The question of who was to pay for it, is all.

The COURT.—As negativing the idea that anybody is responsible but the Craig Lumber Company themselves?

Mr. HELSELL.—That is the idea.

Mr. COBB.—That isn't in the pleadings here. [107—33]

The COURT.—It is in the pleadings with certain charges for labor and certain charges for material—it is all put in together, and there are certain moneys paid for it. This is segregating it, seeing how much comes under the contract and how much does not come under the contract. Proceed.

Q. (By Mr. HELSELL.) Why did it fall in the water,—how did it come to fall in the water?

A. The dock was very frailly built.

Q. Well, did the dock give way? A. Yes, sir.

Q. Collapsed, did it? A. The dock collapsed.

Q. What did you lose by the collapse of the dock?

A. 72,000 brick.

Q. Did you lose all of the brick that was shipped up there on the first shipment?

(Testimony of F. A. Cloudy.)

A. Practically all.

Q. What else did you lose?

A. Lime, fire clay—

Q. Any machinery? A. Dynamo generator.

Q. Generator, you mean—anything else,—how about a boiler front?

A. Yes, two boiler fronts, and some grate bars.

Q. Now, you have marked as an extra invoice No. 280, on January 24, 142 sacks superior cement —state to the Court what that cement was used for. A. For the engine foundations.

Q. Concrete foundations? A. Yes, sir.

Q. We have marked as an extra here invoice No. 288, one transfer truck—state to the Court what that was.

A. That was a truck Mr. Tromble wanted installed to convey the lumber from the dry kiln to the planer, and that would avoid handling the dry-kiln trucks or small hand-trucks and conveying the lumber around to the planer—it would be transferred on that transfer truck, that is, as a whole. [108—34]

Q. Then we have invoice No. 290, one smoke-stack, 30x40, and 17 grate bars—what were they for?

A. That is for a small boiler that was on the ground. The stack had rotted away and fell and he wanted that small boiler installed, and ordered the stack for it.

Q. That was a boiler that was not covered by the contract? A. No, sir.

(Testimony of F. A. Cloudy.)

Q. Do you know about this bathtub—what was that for?

A. I installed that bathtub in Tromble's residence.

Q. Tromble's residence? A. Yes, sir.

Q. There at Craig? A. Yes, sir.

Q. Property of the Craig Lumber Company?

A. I do not know.

(Whereupon court adjourned until 10 o'clock tomorrow morning.)

MORNING SESSION.

March 18, 1920, 10 o'clock A. M.

Mr. HELSELL.—I want to say for the Court that the list of labor which I was reading to the witness yesterday was a list of labor which we claim was not on the contract—which was outside of the contract, and I want to show the Court the reason why I make that contention. The blue-print provides that the buildings which we were to erect were to be erected above the foundations, and no work was to be done on the main carriage at all, and no work or changes to be made in the old sawmill building.

Mr. MARSHALL.—Are you going to offer testimony on that?

Mr. HELSELL.—I am stating what the contract states now.

Mr. COBB.—That differs very much—you are reading your construction of the contract.

Mr. HELSELL.—I am reading from the blueprint.

(Testimony of F. A. Cloudy.)

Mr. COBB.—You are reading your construction of the blue-print.

Mr. HELSELL.—I will read the language, if you like,—I did not know you doubted my word. The contract does not call for any work on carriage or carriage track. "Contract does not call for [109—35] any work on" old boiler—"this boiler," it says: "Boiler-house and machine-shop to be erected above foundations"; "dry kiln to be erected complete above foundations"; "contract does not call for any work on log-slide, haul-up rig, log deck, or over head turner"; "building as shown outside dotted line to be erected new above floor"; *"building as shown outside dotted line to be erected new above floor"*; "contract calls for the installation of machinery as shown on plans, but not any work on present building."

F. A. CLOUDY, on the witness-stand.

Direct Examination (Cont'd).

By Mr. HELSELL.—I show you Plaintiff's Exhibit "D," Plaintiff's Exhibit "C" and Plaintiff's Exhibit "B," and ask you if you will look those over and state whether you have seen them before.

A. Yes.

Q. You have read the descriptions of the machinery on them, have you not? A. I have.

Q. State whether or not that machinery was actually delivered at Craig, Alaska, and used by the Craig Lumber Company. A. It was.

Q. That generally is the machinery and equipment and supplies which you installed there, is it?

A. Yes.

(Testimony of F. A. Cloudy.)

Q. Now, you have already explained that matter of the brick and stuff that fell in the water to the Court. We have on January 24th, invoice No. 280, 142 sacks of Superior cement marked extra on our bill of particulars,—was that connected with the contract or not?

Mr. COBB.—I object to that as calling for the opinion of the witness,—the contract speaks for itself.

Q. What was the cement used for?

A. Engine foundations.

Q. Concrete engine foundations? [110—36]

A. Yes, sir.

Q. I call your attention to invoice No. 288 for one transfer truck—you explained that to the Court, didn't you? A. I did.

Q. And I asked you about the smokestack?

A. Yes, sir.

Q. Invoice No. 305, February 8th, one high lead block; how about that?

A. We had nothing to do with that. That was ordered for the McDonald Weist Lumber Company through the Craig Lumber Company.

Q. They were doing the logging?

A. Logging; yes, sir.

Q. I call your attention to invoice No. 296 for 25 boom chains.

A. They were also ordered for the logging company.

Q. What do you mean by for the logging company?

(Testimony of F. A. Cloudy.)

A. The McDonald Weist Logging Company were logging for the Craig Lumber Company.

Q. Who ordered them from you? A. Tromble.

The COURT.—Those are in the extras?

The WITNESS.—Yes.

Q. (By Mr. HELSELL.) 24 cotton-top mattresses; what were they for?

A. For the Craig Lumber Company—had nothing to do with the contract.

Q. Where did they use them?

A. In the bunkhouse, for the men.

Q. Here is a piece of 3 15/16 inch shafting, 15 feet long, and a flange coupling—what was that used for?

A. For a change made in the plans, authorized by Mr. Tromble.

Q. What was the change? Just tell what it was and where it was.

A. Well, by extending the shaft known as the line shaft that would give them more room between the engines and the roadway—quite a space in there—about 4 feet or more clear, and Mr. Tromble accepted that change. I explained to him that would be extra and he said it was all right, he would have it changed. [111—37]

Q. 12 double-deck steel bunks, invoice No. 320; where were they used?

A. In the bunkhouses—sleeping-bunks.

Q. Now, invoice No. 317, 25 sacks of cement, under date of March 2d; what were they used for?

A. They were shortage.

Q. What were they used for?

(Testimony of F. A. Cloudy.)

A. Concrete engine foundation.

Q. Invoice No. 328, 4 air-tight stoves, stovepipe, etc.; what was that used for?

A. For heating the bunkhouse.

Q. Now, coming to invoice No. 330, the belting, I might ask you this question—was there more belt ordered and shipped up there than was needed to equip the mill and start it and get it running?

A. Yes, sir.

Q. About how much more? A. Nearly double.

Q. What was the purpose of that, do you know?

A. To have extra belt on hand in case of accident to any of the belts.

Q. I show you Plaintiff's Exhibit "F" for identification, and ask you what that is.

A. That is a memorandum of the lengths of belt used. I measured the distances and read them off or called them off to my boy, who put them down on this sheet.

Q. That is the belt that was actually installed?

A. Actually installed.

Q. And it is correct, is it?

A. That is correct, yes, sir.

Mr. HELSELL.—I offer this in evidence. This, with Mr. Corbet's computation, shows the amount of belt used in the mill and the amount put in stockroom.

Mr. COBB.—No objection.

(Whereupon said sheet was received in evidence and marked Plaintiff's Exhibit "F.") [112—38]

Q. I call your attention to invoice No. 337, 225

(Testimony of F. A. Cloudy.)

feet of 35 pound relayers—what were those used for?

A. In connection with that transfer truck, behind the dry kiln.

Q. Who were they ordered by?

A. Craig Lumber Company.

Q. Invoice No. 335, 3 rolls of 2-ply roofing shipped on March 15, $14.42, what was that used for?

A. That was extra, for roofing ordered by the Craig Lumber Company.

Q. For the roof. Invoice No. 370, pump fitted with brass rods; what was that for?

A. Fire pump.

Q. Who ordered that?

A. Craig Lumber Company.

Q. Was that pump ever used? A. It was not.

Q. Where is it now? A. In the mill.

Q. But it was never put in place?

A. Never installed; no, sir.

Q. Why was that?

A. Didn't have fittings to install it with.

Q. Invoice No. 403, one 30 by 24 double arm pulley; what was that for?

A. That was ordered for the extension of that line shaft.

Q. The same purpose as you mentioned about that shaft a while ago? A. Yes, sir.

Mr. COBB.—Pardon me—I want to understand one matter. Are you seeking to recover in this case this pump and any of the articles mentioned as extras?

(Testimony of F. A. Cloudy.)

Mr. HELSELL.—I think probably that is not covered by the contract.

Mr. COBB.—I just wanted to understand the purpose for which you are asking this.

Q. Now, coming to the question of the pay for your men, how you got them paid and how you kept your accounts down there,—you [113—39] worked all of December and then in January had a payroll made, did you not? A. Yes, sir.

Q. Now, did the Craig Lumber Company take care of that payroll themselves?

A. They did not.

Q. What did Mr. Tromble do toward taking care of that? A. Nothing.

Q. When did he leave there after you arrived—how soon afterwards?

A. Very shortly—I think he left about the latter part of December.

Q. What provision did he make to take care of old payrolls before he left?

A. Well, he made no provision; when he left he said "there is money in the safe," and he gave me the combination of the safe and signed three checks, and said, "send those to the bank—make up the amount of my payroll and send those to the bank," or I could go down to Mr. Halvorsen, the merchant there, and draw on him to the amount of $10,000,—he said that on his way up.

Q. These checks he gave you were in blank, were they? A. Blank.

Q. Were you able to get any money on them?

(Testimony of F. A. Cloudy.)

A. No. I sent one to the bank and didn't hear from them.

Q. What did you finally do to get your men paid?

A. I went to Wrangell to see what the bank was going to do about it.

Q. The Bank of Wrangell? A. Yes, sir.

Q. Whom did you see there at the bank of Wrangell? A. Mr. Warren.

Q. W. H. Warren, the cashier?

A. W. H. Warren; yes, sir.

Q. What did Mr. Warren say to you?

A. He said he couldn't do anything about it—that he had written Mr. Tromble repeatedly about making arrangements—wanted him to come in and sign some notes and mortgages and Tromble went [114—40] over there in a condition unfit to do business, and made absolutely no arrangements, and he couldn't do anything for him.

Q. You said what to him?

A. I said then I would either have to quit,—I had a telegram written to Hills-Corbet Company to send us money to come home on—and he said he didn't want me to do that; I said that there was nothing else to do, that the men wanted their money; I didn't dare go back without money to pay them, or money to take them home on.

Q. What was finally agreed between you and Mr. Warren?

Mr. COBB.—I think that is wholly irrelevant and immaterial—all of this was.

(Testimony of F. A. Cloudy.)

Mr. HELSELL.—It is purely preliminary, to show how they financed it.

The COURT.—What did you do with reference to it?

Q. (By Mr. HELSELL.) What did you do toward getting any money finally to pay your men?

A. Well, Mr. Warren said that he didn't want me to leave there and he would make arrangements and have Mr. Tromble sign up when he came back, so he told me that he would honor that check.

Q. What check?

A. That I would make for that amount.

The COURT.—That he would what?

The WITNESS.—If I would write a check and sign it Craig Lumber Company by F. A. Cloudy, that he would honor it and transfer that to Hills-Corbet Company's credit for me to check against and sign Hills-Corbet Company, by F. A. Cloudy.

Q. So what did you do in the way of opening an account there? A. Well, that is what I did.

Q. Opened an account in the name of Hills-Corbet Company? A. Yes, sir.

Q. In the Bank of Wrangell? A. Yes, sir.

Q. At Wrangell? A. At Wrangell; yes, sir.

Q. And deposited in your account a check drawn by you, signed [115—41] Craig Lumber Company, by F. A. Cloudy? A. Yes, sir.

Q. For how much? A. $3,500.00.

Q. And then you paid your men off by drawing checks of what kind? How did you sign your checks that you paid the men off with?

(Testimony of F. A. Cloudy.)

A. Hills-Corbet Company, by F. A. Cloudy.

Q. Now, you kept a series of check-books, did you not? A. Yes, sir.

Mr. HELSELL.—Have you those stubs, Mr. Cobb?

Mr. COBB.—Here they are.

The COURT.—Let me understand right here—I understand you to say that the bank said if you would open an account in the name of Hills-Corbet Company and deposit a check signed Craig Lumber Company by you, that they would put that amount of money to the credit of Hills-Corbet Company and that you then paid your men out of the money that they put to your credit?

The WITNESS.—Yes, sir.

The COURT.—Is that money being sued for?

Mr. HELSELL.—No; this is simply for the purpose of arriving at the total amount of labor which we expended, as preliminary.

The COURT.—You admit that amount of money has been paid you?

Mr. HELSELL.—Well, the way we got at it is to simply show the amount we expended, including the $10,500 which Mr. Cobb talks about, and some more in the way of overdrafts.

The COURT.—Do I understand that you give the Craig Lumber Company credit for the amount of money that was deposited to your credit?

Mr. HELSELL.—No, because out of these checks we ran the Craig Lumber Company as well as our own business, and so the only way we can find out

(Testimony of F. A. Cloudy.)

how much they should charge to us is to pick out of these checks the labor which was applicable to our contract—in other words, these four stub-books represent all of his checks that he drew. Now, those represent a large amount of the Craig Lumber Company business, and also a large amount of Hills-Corbet business. He ran everything—he had to run the [116—42] bunkhouse—he had to do things which had no relation to our work, and was in sort of a dual capacity; and so the total amount of the checks in this check-book represent two forms of expenditure, for the Hills-Corbet Company and for the Craig Lumber Company, and the only way we can get at the amount which should be charged to us is to pick out of these checks the labor that should be charged to the Hills-Corbet Company.

The COURT.—Yes; but what I am trying to get at is whether or not in casting your account you gave the Craig Lumber Company credit for the amount of money that the bank placed to the credit of the Hills-Corbet Company.

Mr. HELSELL.—We do not on our books because a lot of that did not concern the Hills-Corbet Company at all, and if we did we would have to charge it back again.

The COURT.—But I mean in making your claim against the Craig Lumber Company, does it include that $6,500 that the Craig Lumber Company—

Mr. COBB.—$10,500.

(Testimony of F. A. Cloudy.)

The COURT.—How much money did the bank put to the credit of the Craig Lumber Company?

The WITNESS.—The first check was for $3,500—that was one of the checks that Tromble gave me; the second check was one I drew for $3,500, and I think that I drew the third check for $3,500.

Mr. HELSELL.—The Court wants an explanation from me as to how we carried these amounts on our books?

The COURT.—I am not talking about your books—I am talking about the claim you are making here. Does your claim include that $10,500—are you charging them up with that in your suit?

Mr. HELSELL.—We are not charging them with it.

The COURT.—You are not suing to get that back?

Mr. HELSELL.—No—all we are doing is crediting them with part of it.

The COURT.—Very well.

Q. (By Mr. HELSELL.) Now, I show you four stub-books and ask you what those are?

A. Those are stubs of checks—stub-books. [117—43]

Q. Were they kept by you? A. Yes, sir.

Q. Stubs of check-books kept by you?

A. Yes, sir.

Q. What expenditures do they cover?

A. All the checks that I wrote for labor and other expenditures for the Craig Lumber Company.

Q. That represents all the checks you wrote in

(Testimony of F. A. Cloudy.)

payment of anything? A. I think so; yes.

Q. And they were all drawn on the Bank of Wrangell, were they? A. Yes, sir.

Q. Are there also included here checks payable to the Craig Lumber Company's account?

A. Yes, sir.

Mr. COBB.—I object to your leading the witness constantly.

The COURT.—I do not think it is viciously leading, Mr. Cobb.

Mr. COBB.—Let him state what they were drawn for.

The COURT.—He couldn't do that without taking each check out and asking about each one specifically.

Q. Did you pay out of these check-books all expenses of running the boarding-house? A. I did.

Q. All of the expenses of the Craig Lumber Company? A. I did.

Q. Now, you refer to a crew of the men of the Craig Lumber Company; what were they doing?

A. They were clearing land for bunkhouse locations.

Q. Did you superintend that work, too?

A. I did.

Q. And keep the time of that work? A. I did.

Q. And pay that? A. I did.

Q. And pay it with Hills-Corbet checks?

A. I did. [118—44]

Q. Sign Hills-Corbet Company's name?

A. Yes, sir.

(Testimony of F. A. Cloudy.)

Mr. HELSELL.—I offer these in evidence.

Mr. COBB.—No objection.

(Whereupon said check-book stubs were received in evidence and marked Plaintiff's Exhibit "M.")

Q. Now, I notice, Mr. Cloudy, that you have marked on the stubs of some of these checks "Craig Lumber Company"—what does that mean?

A. That was checks signed Craig Lumber Company and not Hills-Corbet Company.

Q. Was it signed by you "Craig Lumber Company"? A. Craig Lumber Company; yes, sir.

Q. Did Mr. Warren honor checks signed by you "Craig Lumber Company"? A. He did.

Q. (By Mr. COBB.) Are those canceled checks returned to you? A. Yes, sir.

Mr. COBB.—Have you got them?

Mr. HELSELL.—We have some of them, Mr. Cobb,—I don't know whether we have them all.

Mr. COBB.—I would like to see them—this is not the best evidence.

Mr. HELSELL.—It is just as good as the check.

The COURT.—Mr. Cloudy, did you mark the stub of every check that you signed "Craig Lumber Company"—did you mark that on the stub?

A. Yes, sir.

The COURT.—Then, if a person goes through these stubs and sees on the stubs "Craig Lumber Company," that means—

The WITNESS.—That the check was made out—

The COURT.—And that is all that you did?

The WITNESS.—Yes, sir.

(Testimony of F. A. Cloudy.)

The COURT.—And everything else in these is signed—

The WITNESS.—Hills-Corbet Company.

The COURT.—If there is no designation on the stub the checks were signed "Hills-Corbet Company"? [119—45]

The WITNESS.—Yes, sir.

Q. (By Mr. HELSELL.) Now, I notice after the first few checks you do not sign "Craig Lumber Company" on the stub at all—why was that?

A. Mr. Tromble said they had no credit there, and asked me not to write any more checks because they were returning them.

Q. Who did?

A. Mr. Tromble, of the Craig Lumber Company.

Q. They were returning them? A. Yes, sir.

Q. So thereafter did you pay the Craig Lumber Company bills with the Hills-Corbet checks?

A. Yes, sir.

Q. The bunkhouse expenses, and all?

A. Yes, sir.

Q. And sign them Hills-Corbet Company?

A. Signed them Hills-Corbet Company; yes, sir.

Q. Now, you have marked on these stubs "not on contract Hills-Corbet Company"—under what circumstances did you make that notation on your checks?

A. Those checks marked "not on contract" were given in payment for labor that was aside from anything connected with the sawmill or sawmill

(Testimony of F. A. Cloudy.)

building and men who were not Hills-Corbet Company men.

Q. Just give the Judge an illustration of what you marked "not on contract."

A. Where a man who was not a Hills-Corbet man was working on extra work and not on Hills-Corbet work.

Q. For instance, what kind of work?

A. Clearing land, one of the checks is for, and the stub therefor was marked "not on contract."

Q. Now, state to the Judge,—and let me call your attention again, you have other checks that you have marked "on contract Hills-Corbet Company" —now state to the Judge under what circumstances you would write that on the stub. [120—46]

A. Where I paid a man off who was a Hills-Corbet man working on the mill, whether it was extra or on contract, I marked it "on contract."

Q. Why did you mark all labor on the mill "contract"?

A. Because they were Hills-Corbet men, and as I understand the contract, according to the terms of it, Hills-Corbet is to receive 10 per cent on labor.

Q. So all the Hills-Corbet men who worked on the mill and were paid by check were marked "on contract"? A. Yes, sir.

Q. And that was regardless of whether it was extra work or on contract work? A. Yes, sir.

Q. In other words, we read over in a list of labor, for instance "cutting wood for cookhouse" etc. yesterday, do you remember? A. Yes, sir.

(Testimony of F. A. Cloudy.)

Q. Was that all paid by checks of the Hills-Corbet Company which were marked "on contract"?

A. It was because they were Hills-Corbet men.

Q. Regardless of whether in your opinion it should be counted in on the contract price or not?

A. Because they were Hills-Corbet men, yes, sir.

Q. Then, showing you the time represented by Plaintiff's Exhibit "J," when those men were paid they were paid with the Hills-Corbet Company check marked "on contract"? A. Yes, sir.

Q. For the whole time they put in?

A. Yes, sir.

Q. Whether it was cutting wood or anything else?

A. Yes, sir.

Q. Simply because they were one of your men?

A. Yes, sir.

Q. That is right? A. Yes, sir.

Q. I show you Plaintiff's Exhibit "K," the time-book showing the [121—47] time for January, February, March and April, and I ask you whether all of the time shown on that book, regardless of what it was on, was paid for by checks marked "on contract." A. Yes, sir.

Q. About when did you get your work completed down there?

A. The major part of it was completed—the saw-mill started the 26th of April and operated by the company from the 1st of May; the planing-mill wasn't completed until about July,—that is, all of the work wasn't completed.

(Testimony of F. A. Cloudy.)

Q. How much of a crew did you keep around there during May and June? A. No crew but myself.

Q. Nobody but yourself? A. No, sir.

Q. And the rest of it was finished—the planing-mill was finished about July, you say?

A. Yes, sir.

Mr. HELSELL.—I think, if the Court please, that I will not offer my rebuttal now, but I will wait and see what the defense puts in and then put it in in regular order.

The COURT.—Are you through with this witness?

Mr. HELSEL.—Yes, on direct; take the witness.

Cross-examination.

(By Mr. COBB.)

Q. Mr. Cloudy, you stated that the first deposit made to the credit of the Hills-Corbet Company in the Bank of Wrangell was a check drawn by you?

A. I explained that to the Judge. When the Judge asked me I told him it was the first check drawn by Mr. Tromble that had been handed me—that was signed by Mr. Tromble and I filled it out; then I wrote the second check for $3,500.00, and the third check also.

Q. How was the second signed?

A. Craig Lumber Company.

Q. By whom? A. F. A. Cloudy. [122—48]

Q. And the second check? A. Yes, sir.

Q. I hand you a check here dated January 5, 1918, and ask you if that is the first check that you received? A. No, I think that was the second.

(Testimony of F. A. Cloudy.)

Q. You think that was the second,—you didn't get a third, did you?

A. I got three. I am not sure—

Q. I hand you a check that was paid by the bank on January 17th—that was put to the credit of the Hills-Corbet Company? A. Yes; that is the first.

Q. And charged to the Craig Lumber Company—Craig Lumber Company's money that paid it?

A. Yes, sir.

Q. I hand you one dated January 24th and ask you if that is the second check that you got?

A. Yes, sir; that is the second check, January 24th.

Q. That was signed by you and paid by the bank?

A. Yes, sir.

Q. Out of the Craig Lumber Company's money, of course? A. Yes, sir.

Q. Now, the third one—

A. No, I never saw that one.

Q. You never saw that? A. I never saw that.

Q. You knew there was $10,500 put to your credit?

A. Yes, sir; I saw so from the bank statement.

Q. You saw that from the bank statement?

A. Yes, sir.

Q. But this was apparently put in there without being endorsed, and put to their credit?

A. I never saw that check before.

Q. But you know there was $10,500 altogether put there to your credit? A. Yes, sir. [123—49]

(Testimony of F. A. Cloudy.)

Mr. COBB.—Now, we offer, in connection with his cross-examination, these three checks.

Mr. HELSELL.—I have no objection to them.

(Whereupon said checks were received in evidence and marked Defendant's Exhibit No. 1.)

Q. Now, that money was furnished you by the Craig Lumber Company on account of the contract to pay the labor and that the Hills-Corbet Company was to be responsible for it? A. Yes, sir.

Q. Did you ever account to the Craig Lumber Company for this money?

A. They had access to my stubs at all times.

Q. I know, but did you ever account to them for it—furnish them a statement of what you had done with this $10,500?

A. At all times it was right there.

Q. When? A. At all times.

Q. I am asking you, Mr. Cloudy, when you ever gave them an account of what you had done with this $10,500 they had paid to the Hills-Corbet Company through you as Hills-Corbet's agent, as to what you had done with that money.

A. No, I never gave them a statement.

Q. Never did. Now, then, you checked out on Hills-Corbet's check considerably more money than the $10,500, didn't you? A. Yes, sir.

Q. Do you know how much more?

A. No, I don't know now.

Q. In other words, when the $10,500 that the Craig Lumber Company had furnished you had all been checked out you continued to draw checks and

(Testimony of F. A. Cloudy.)

the bank honored them and charged them to the Craig Lumber Company? A. Yes, sir.

Q. And you don't know how much?

A. No, I cannot tell you now.

Q. Cannot tell now. Before I get to that, this machinery that was shipped up there, did you receive it? [124—50] A. Yes, sir.

Q. You received the brick and all that stuff that was lost on the dock, did you?

A. No,—what do you mean that I received it?

Q. You were the Hills-Corbet man there to install this mill? A. Yes, I was there to install the mill.

Q. And you were superintending everything?

A. Yes, sir.

Q. Had entire charge of everything?

A. Yes, sir, during Mr. Tromble's absence.

Q. During Mr. Tromble's absence. During what time was Mr. Tromble absent?

A. Most of the time.

Q. Was he there at the time all of this stuff was lost overboard the dock? A. Yes, sir.

Q. What time was that?

A. That was in December.

Q. December?

A. The latter part of December.

Q. Did Mr. Tromble direct that it be put on the dock? A. Yes, sir.

Q. You didn't have anything to do with it only handling it on the dock?

A. If I had, I would not have unloaded it all on the dock.

(Testimony of F. A. Cloudy.)

Q. I am asking you if you did. A. No.

Q. You hadn't delivered it to the Craig Lumber Company at that time?

A. I had nothing to do with the delivering of it.

Q. Did you represent the Hills-Corbet Company?

A. I was there to install it—I wasn't there to receive it.

Q. You were there to install it,—you couldn't install it without receiving it, could you?

A. The Craig Lumber Company were to receive it. [125—51]

Q. Oh, the Craig Lumber Company were to receive it? A. Certainly.

Q. And then turn it back to you to install?

A. I think so.

Q. That is the way you understood it?

A. Yes, sir.

Q. What did they receive and turn back to you for the purpose of installation?

A. Why, all of it,—all of the machinery they didn't lose.

Q. Who received it when Mr. Tromble wasn't there? A. I did.

Q. You did, and you say he was gone most of the time? A. Yes, sir.

Q. When you got there to begin this work of installation, what time did you first reach there, Mr. Cloudy? A. Second of December, 1917.

Q. The 2d of December,—who did you find there?

A. Mr. Tromble.

Q. Who else? A. Quite a number of people.

(Testimony of F. A. Cloudy.)

Q. Did the Craig Lumber Company have a crew of men there at that time? A. They did not.

Q. No employees there at all?

A. None connected with the mill.

Q. You brought a crew of men up with you?

A. Yes, sir.

Q. They were all employees of the Craig Lumber Company,—I mean of the Hills-Corbet Company?

A. Yes, sir.

Q. How long before the Craig Lumber Company had any men employed there?

A. Not until they took the mill over.

Q. When was that?

A. They had a donkey crew that had been doing some logging for them and came in and were doing some clearing. [126—52]

Q. I am talking about their work on the mill proper. A. They had no men there.

Q. They had no men there at all. You didn't pay the donkey crew, did you?

A. When they came into the yard there, clearing the land, I did, yes.

Q. That is when you hired them?

A. No, I didn't hire them; they were there already hired, the donkey crew was.

Q. When did they come?

A. Some time in December—just before Christmas.

Q. How many of those men were there?

A. Oh, varied from 4 to 6.

Q. Who varied it? A. Varied themselves.

(Testimony of F. A. Cloudy.)

Q. Who hired and discharged them?

A. The Craig Lumber Company hired, and if there was any to be discharged I suppose it was up to me to discharge, but I didn't discharge any.

Q. Who was hired by the Craig Lumber Company? Tell me those men's names.

A. Some of them,—I cannot recall all of them now. Harry Nailor for one,—I don't recall the names.

Q. They varied from four to six, you say?

A. Yes, sir.

Q. How many men did you have working for Hills-Corbet Company?

A. 17 to 18, including myself.

Q. How long did these men that you say varied from four to six, continue to work for the Craig Lumber Company?

A. Oh, I cannot tell you without looking at the time-book.

Q. Cannot tell. Now, then, what did you do about taking care of your men during the time you were installing the mill with reference to board and lodging? Who provided that—did you?

A. The Craig Lumber Company.

Q. The Craig Lumber Company—did you give them any credit for that, as agent of the Hills-Corbet Company? [127—53] A. Why, no.

Q. That was a necessary expense of installation, wasn't it,—wasn't that a necessary expense?

Mr. HELSELL.—I object—those questions are purely argumentative, and it is not proper cross-

(Testimony of F. A. Cloudy.)

examination, and I object to it on that ground. I have no objection to his going into the question of board, but when he asks if it was a necessary cost of installation, that is purely argumentative.

The COURT.—I think he may answer. I want to get to the bottom of it.

The WITNESS.—Repeat the question, please.

Q. The board and keep of the men that they were working for the Hills-Corbet Company was a necessary expense of that installation, wasn't it?

A. Why, I consider it a necessary expense; yes.

Q. Did you pay that? A. I did not.

Q. That board and keep entered into the cost of the erection and installation of the mill under the contract?

A. I don't know whether it did or not.

Mr. HELSELL.—Those are matters to argue befor the Court.

Mr. COBB.—I want to get the facts before the Court so I can argue them.

Q. In other words, what I want you to tell the Court, Mr. Cloudy, you couldn't have installed that mill and put up the buildings that were called for in that contract without boarding the men, could you?

A. Not without some way of boarding them; no.

Q. Without their being boarded, then?

A. No.

Q. You described on yesterday certain changes that were made, you say, from the plans attached to the contract. Of the work you actually did,—for

(Testimony of F. A. Cloudy.)

instance, elevating the roof, did you charge as extras the entire charge of putting the roof on as elevated?

Mr. HELSELL.—I object unless he says what he means by charging as extras. Does he mean the Hills-Corbet Company charged as extra, [128—54] or did he charge as extra?

Mr. COBB.—He was managing the whole thing—never asked Hills-Corbet Company anything about it.

Mr. HELSELL.—Charged where? On whose books?

The COURT.—I understand the question to be whether or not the entire cost of the roofing is in what is delineated as extras, or whether it comes under the contract.

Mr. HELSELL.—If he means by that on the check-books, I have no objection to his asking that, but he doesn't say that.

Mr. COBB.—That is what I am getting at.

Q. Now, the entire cost of the work done on the roof as changed, did you mark your checks,—you paid that by checks, did you?

A. I paid that by checks; yes, sir.

Q. Did you mark all of those "not on contract," or did you mark them "on contract"?

A. They are all marked "on contract" wherever a man worked for Hills-Corbet on the mill.

Q. On the mill, regardless of changes?

A. Or anywhere else; those checks were marked "on the contract," regardless of changes; yes.

(Testimony of F. A. Cloudy.)

Q. One other question or two along those lines. I will ask you something about the foundations of your engines and boilers. Is it possible to install an engine in a sawmill, and sawmill machinery, without a foundation? A. No.

Q. That was part of the installation, then?

A. Why, yes; necessary for installation.

Q. Impossible to put a big heavy boiler and sawmill machinery on a wooden floor, on piles?

A. No, it is not impossible.

Q. To make it run, I mean? A. Well—

Q. To properly install it,—you know what I mean. Can you answer the question?

A. State that question again, please. [129—55]

Q. I say to properly install sawmill machinery, boilers, etc., you have got to have a foundation,—something more than an ordinary wooden floor, haven't you? A. No, not necessarily.

Q. Not necessarily? A. No.

Q. Why did you put in the foundation, then?

A. Because there was no foundation there.

Q. There was a floor there, wasn't there?

A. Not in all cases; no.

Q. Wasn't there in this case? A. No.

Q. No floor at all?

A. Not in all cases—I mean about different parts of the work; there was no floor on that space covered by the boiler-house; there was no floor on all of the space covered by the planing mill addition.

Q. That was on the solid ground?

A. Partly, yes.

(Testimony of F. A. Cloudy.)

Q. And you put in a foundation there for the installation of the boilers and machinery?

A. Yes, sir.

Q. A cement foundation. That was the proper way to construct it—proper way to install it?

A. Yes,—there was two ways; use wooden foundations or use concrete foundations.

Q. And the concrete foundation is the first-class way of doing it? A. Yes, sir.

Q. And the proper way of doing it?

A. Not exactly the proper way. Wood foundations are just as good in places.

Q. About this belting you have talked about in the extras there, you don't know whether there is any of that belting there at all now or not, do you? A. Yes. [130—56]

Q. How much of it?

A. I don't know just how much of it there is, but there is a considerable amount—practically all that was left there was there some months ago.

Q. That is, the extra is left. The other belting that was furnished under the contract is worn out and gone, isn't it? A. Oh, no.

Q. How much of it is not?

A. Practically none of it worn out.

Q. Do you know that?

A. Yes, I think I do.

Q. You think you do. When did you see it last?

A. The 2d of March.

Q. The second of March? A. Yes.

Q. Of this year? A. Yes, sir.

(Testimony of F. A. Cloudy.)

Q. Did you go through the mill and take a look at it? A. Yes, sir.

Q. Now, the only way you can segregate the belting that they have asked you about as extras here from the belting that was furnished under the contract is by a computation of the amount required? A. By what?

Q. By a computation of the amount required in the first instance to equip the mill? A. Yes, sir.

Q. That is the only way you have of segregating it? A. Yes, sir.

Q. Telling how much of it is one and how much of it is the other? A. Yes, sir.

Q. How many dynamos are there down there?

A. One installed and one in the bay.

Q. One installed and one in the bay? A. Yes.

Q. There never was but two shipped up? [131—57] A. That is all.

Q. And the first one that was shipped up under the contract went in the bay, and the next one is the one that they have charged here as an extra, is it?

A. I don't know which one you are talking about. The second one,—I don't know whether the second one was charged by error, or whether it is the one that is really installed there now.

Q. One went in the bay?

A. One went in the bay, and one is installed.

Q. As a matter of fact, they have three charged and they didn't ship up but two?

Mr. HELSELL.—Our bill of particulars recog-

(Testimony of F. A. Cloudy.)

nizes that mistake and changes that to two.

Mr. COBB.—I didn't notice that. The original claimed there were three shipped up.

Q. When you got that machinery up there which was shipped up under the contract, you say, what did you do with it? A. Installed it in the mill.

Q. Put it in the building and used it in constructing this sawmill? A. Yes, sir.

Q. And it was fastened into the building as a sawmill usually is? A. Yes, sir.

Q. And it was in that condition when you left it?

A. Yes, sir.

Q. And you did that as representative of the Hills-Corbet Company? A. Yes, sir.

Q. The boilers were fastened down in cement foundations?

A. No; the boilers are suspended from an "I" beam steel frame gallows and enclosed in a brick furnance.

Q. What does the brick furnace rest on?

A. On a rock fill.

Q. On a rock fill? A. Foundation.

Q. And these beams are fastened into the building above? A. No. [132—58]

Q. You say it is suspended from "I" beams?

A. Yes, sir.

Q. How are the "I" beams held in place?

A. They have a footing on the foundation below.

Q. A footing on the foundation below?

A. Yes, sir.

Q. Fastened very firmly? A. Yes, sir.

(Testimony of F. A. Cloudy.)

Q. How is your sawmill installed?

Mr. HELSELL.—Sawmill?

Mr. COBB.—The saws in it.

The WITNESS.—The same as in any sawmill.

Q. The same as in any sawmill—it is fastened into the building, is it? A. Fastened—

Mr. HELSELL.—I think you ought to call the Court's attention to some machine you are talking about instead of talking generally. Ask him about the various machines.

Q. Just tell the Court generally how you install a sawmill and how you installed this one.

Mr. HELSELL.—I certainly object to the blanket nature of that question, how you install a sawmill. We only put up certain kinds of machinery, and he is trying to prove by this witness now one of his affirmative offenses, that this is a fixture.

The COURT.—I know, Mr. Helsell; but you brought out of this witness that he installed it. Now, Mr. Cobb is asking him on cross-examination, what do you mean by installing it—what did you do to install it?

Mr. HELSELL.—He is asking, what do you mean by installing a sawmill. My main point is that we install only certain forms of machinery.

The COURT.—Yes, the question is too broad. Confine it to this particular machinery,—how did you install this particular machinery—what did you do with it?

Q. (By Mr. COBB.) You say you installed this sawmill and machinery, [133—59] and turned it

(Testimony of F. A. Cloudy.)

over complete? A. Yes, sir.

Q. How did you install this Berlin resaw?

A. That is set up on the floor, and its base screwed down to the floor with lag screws.

Q. Fastened very firmly?

Mr. HELSELL.—He stated how it is fastened. You can put your own construction on it.

Mr. COBB.—I have a right to ask him.

Q. It is fastened very firmly, is it?

A. Well, so it cannot walk around the floor.

Q. Well, now, that 16x22 Atlas engine complete with catalogue fittings; what did you do with that?

A. That is set up on a concrete foundation.

Q. Fastened into the concrete?

A. Not fastened into the concrete—fastened to the concrete foundation.

Q. That is what I mean, fastened to the concrete foundation? A. Yes, sir.

Q. How is it fastened to it? A. By bolts.

Q. Bolts anchored into it?

A. Anchor bolts set in concrete.

Q. One Jewel engine—what did you do with that?

A. The No. 3 Jewel engine is in the filing-room and machine-shop combined, setting on a block of wood and the block is bolted to the floor and the engine bolted to the block with lag screws.

Q. The next one—what did you do with the Frost engine, 18x20?

A. The Frost engine is the engine that drives the head-saw; that is fastened on a concrete foundation by anchor bolts in the concrete.

(Testimony of F. A. Cloudy.)

Q. What did you do with the hand-saw gummer?

A. The hand-saw gummer is in the filing-room setting on the floor—screwed to the floor with wood screws.

Q. What did you do with the 16-inch lathe? [134—60]

A. The iron lathe is sitting on that same floor—machine-shop and filing-room combined, and is not fastened to the floor.

Q. Just sitting there? A. Just sitting there.

Q. Part of that mill equipment, is it?

A. Yes, I think so.

Q. What does "dry kiln equipment" consist of?

A. Dry kiln equipment consists of pipe, headers, posts for track, spreader beams for the track, lateral braces, track, rail, fish-plates for joining the rails, and dry-kiln trucks.

Q. Now, what did you do with that equipment in reference to installing the dry kiln?

A. The dry kiln is installed.

Q. How did you install it—what did you do with this equipment that was shipped up?

A. The dry-kiln equipment?

Q. Yes.

A. Installed the pipe into the dry-kiln room.

Q. What does the dry-kiln consist of?

A. The dry-kiln consists of a room.

Q. What dimensions?

A. In that case about 24 feet wide, 12 or 16 feet in height, 104 feet long over all.

Q. In installing it, this equipment that was sent

(Testimony of F. A. Cloudy.)

up here was simply taken and fastened in that room?

A. Set on mudsills within that room, separate from the building.

Q. And the track is laid into it?

A. The track is laying on posts that stand on the foundation—not connected with the building.

Q. Did you ever finish that dry kiln?

A. Didn't hang the doors, no.

Q. Couldn't work it without the doors, could you?

A. They didn't want the doors on at that time.

Q. Now, Mr. Cloudy, you installed all of this machinery in the mill there for the Hills-Corbet Company substantially as you have [135—61] described to the Judge what you have done?

A. Yes, sir.

Q. Now, you have identified and put in evidence here certain time-books that you say discloses whether or not the labor done on these time-books was being done under the contract or otherwise—do they show that?

A. Yes, sir,—they don't show whether the work was done on contract or otherwise, but it shows the work that was actually done?

Q. They show the work that was actually done?

A. Yes, sir.

Q. It doesn't show whether the work was done under the contract or otherwise?

A. No, simply describes the work.

Q. You say that in drawing checks, however, to

(Testimony of F. A. Cloudy.)

pay these men you would mark some of them under contract and some not on contract? A. Yes, sir.

Q. That was done at the time?

A. Yes, sir; at the time of payment—yes.

Q. You did that as agent of the Hills-Corbet Company, with authority to sign their checks?

A. I did that for my own memorandum.

Q. For your own memorandum? A. Yes, sir.

Q. But I say as you drew these checks you paid out this money as agent; authorized to do that as agent of the Hills-Corbet Company?

A. Yes, sir.

Q. Did you use more than four stub-books?

A. I don't think so; no.

Q. And these stub-books that have been introduced here will show the stubs of the checks that you drew? A. I think so.

Q. In disposing of this $10,500 and part of the overdraft.

A. I think so, with the exception of one counter check, I believe, in Wrangell. [136—62]

Q. What do you mean by a counter check?

A. A check taken from the counter in the bank.

Q. What is that?

A. A check taken from the counter and marked "counter check."

Q. Do you remember what that was for—how much that was? A. $25, I think.

Q. $25?

A. Either $20 or $25. I might have made a record of it in the stub-book; I don't remember.

(Testimony of F. A. Cloudy.)

Q. Now, check No. 1 that you drew on January 18, 1918, the day after this first $3,500 check was placed to your credit in the bank of Alaska, that was payable,—just look at that check—that was No. 1 of that series? A. That is the counter check.

Q. That is the counter check?

A. Yes; I made a record of it in the stub-book. The check itself did not come from this book.

Q. You afterwards, though, marked that check on your stubs so you would have a record of it?

A. Yes, sir.

Q. What did you draw that check for?

A. The stub says what is is for.

Q. "F. C. Cloudy for expenses, Craig, Alaska, to Wrangell and return"? A. Yes, sir.

Q. You were at that time in the employ of the Hills-Corbet Company? A. Yes, sir.

Q. And took that trip on their business?

A. No.

Q. What was your business?

A. To see the Bank of Wrangell about making arrangements to pay my men.

Q. Men that you had employed for the Hills-Corbet Company? A. Yes, sir.

Q. Hills-Corbet business then?

A. No, Craig Lumber Company business because the Craig Lumber Company [137—63] had failed to make arrangements to pay my men, and I had to go to Wrangell to make such arrangements.

Q. You had to go there to make such arrangements? A. Yes, sir.

(Testimony of F. A. Cloudy.)

Q. Then this check you charged to the Craig Lumber Company?

A. Yes; I think that check is on the contract.

Q. How is that? A. On contract, I think.

Q. (By Mr. HELSELL.) Did you so mark it, Mr. Cloudy? A. I think so.

Q. (By Mr. COBB.) You haven't marked it either way. These checks all speak for themselves, do they—these memoranda?

A. Not entirely; no.

Q. In what respect do they not?

A. They simply don't show the kind of work in which they were in payment.

Q. Take check No. 3 there, to John Scott, dated January 21, 1918, total amount of check $89.40, you have got "not on contract $44.40" and "on contract $45.00"—is that correct?

A. Yes, sir—that was put on there later.

Q. Did you put that on there?

A. Yes, sir; when I started to segregate the labor and put the labor in on contract and on extras.

Q. Did you do that with all of them?

A. No, not all of them.

Q. Why not?

A. Because the stubs were taken away from me and I didn't have a chance to segregate the work.

Q. Who took them away from you?

A. Mr. Henry Shattuck borrowed them from my wife—said he would return them in an hour or so.

Q. When did you make that memorandum?

A. About June or July—somewhere in there,—

(Testimony of F. A. Cloudy.)

I was making my final reports to the Hills-Corbet Company.

Q. How far did you get along before Mr. Shattuck took them away from you? [138—64]

A. I don't remember without looking over it how far I got along.

Q. Except where these changes like that have been made, though, there are other memoranda at the time you drew the check,—I mean you would fill out these stubs at the time you were writing the check? A. Yes.

Q. You never made any report or furnished any statement, I believe you say, however, to the Craig Lumber Company of what you did with this $10,500 represented by these three checks?

A. No, I never made any statement to them.

Q. Nor of what you did with the money that you drew out there on Hills-Corbet checks as overdraft against the Craig Lumber Company—never made any report of that? A. No.

Q. And you don't know how much that was?

A. No.

Mr. COBB.—That is all.

Mr. MARSHALL.—If the Court please, may I ask him a question? I am not really on the record in this case at all, but I do represent the bank?

The COURT.—Yes, certainly you may ask him a question.

(Questions by Mr. MARSHALL.)

Q. Mr. Cloudy, when you went up there did you go direct to Craig, or where did you go, from

(Testimony of F. A. Cloudy.)

Seattle? A. From Seattle direct to Craig.

Q. On what boat? A. "Santa Ana."

Q. And after you got there Mr. Tromble left in about five days, you said?

A. I cannot tell exactly the number of days—some days after—about the first part of December.

Q. And you got there the first part of December—on the second?

A. I got there the second of December.

Q. Then he didn't come back for a long time? [139—65]

A. He was gone for quite a while,—I cannot tell you the exact number of days he was gone.

Q. Wasn't it during the greater part of the time you were engaged in the work there?

A. That he was gone?

Q. Yes.

A. Yes, pretty much until March. From March on he was there.

Q. But from early in December until March he was not there?

A. Not much of the time, no. He made two trips—

Q. Did this "Santa Ana," the boat you went up on—did she take the mill up also? A. No, sir.

Q. When did that arrive?

A. The engines and the dry-kiln equipment, the resaw—

Q. I don't care for the particulars.

A. I think that was already there.

Q. That was already there when you got there?

(Testimony of F. A. Cloudy.)

A. Yes, sir.

Q. Where was it?

A. Part of it was stored in the old mill shed and some of it yet on the dock.

Q. And what time was it that this dock went down with the material?

A. That was in,—just a few days before Mr. Tromble left. It was early in December. The boat arrived there, I think, in a week or ten days after we arrived, with the brick. I am not certain about the date now without looking it up.

Q. Well, you had entire charge of the cargo arriving, and distributing it for the purpose of erecting it subsequently, didn't you?

A. No; Mr. Tromble of the Craig Lumber Company asked me to use my men for that purpose as he had no men of his own.

Q. It was landed right on the dock, wasn't it, practically where it was to be installed?

A. No.

Q. All that was needed to be done was to be put in position? A. No. [140—66]

Q. What dock did they land it on?

A. On the mill company dock.

Q. It was a small dock—it was almost like moving it into position, was it not?

A. Oh, no; there is a long, narrow approach to the dock.

Q. Was the dock then the way it is now?

A. Yes, sir—no, there has been an addition between the mill proper and the dock, built in on the

(Testimony of F. A. Cloudy.)

east side. That was all open between the sawmill proper and the dock.

Q. Did you at all times while you were there have men working under you who were really employees of the Craig Lumber Company, or only part of the time? A. Only part of the time.

Q. Was that early in the work—the early part of the work, or what part?

A. Well, yes, you might say in the early part, because immediately after Mr. Tromble left, why, it was all left to me, so—

Q. And the men you were using were all men employed by the Hills-Corbet Company?

A. No, not all the men I was using were not employed by the Hills-Corbet Company.

Q. When did you finish with the crew the Craig Lumber Company had and do the work entirely with your own men?

A. I didn't work any but the Hills-Corbet Company men on the mill proper, and the other men were working on clearing land for bunkhouses and such at intervals when the weather permitted.

Q. Were they so working throughout the whole time you were there? A. Yes, sir.

Q. Until the mill was completed? A. No.

Q. That work was finished about what time?

A. Let me see—the work of clearing the land for bunkhouses, I think, was finished some time in May; then the erection started—erection of bunkhouses. [141—67]

Q. In March you were paying, for instance, a

(Testimony of F. A. Cloudy.)

man by the name of Kinkaid as cook—was he the cook in the bunkhouse you were running?

A. Yes, sir.

Q. And in that bunkhouse you were feeding mostly the men employed by the Hills-Corbet Company? A. Yes, sir.

Q. And you have marked the checks, "paid to Kinkaid, not on contract"?

A. Yes, sir, because he was not a Hills-Corbet man.

Q. He was not a Hills-Corbet man but he was feeding the Hills-Corbet men?

A. The Hills-Corbet men were eating at that cookhouse; yes.

Q. And it was your opinion that he wasn't a Hills-Corbet man and it wasn't a proper Hills-Corbet expense?

A. And that the Hills-Corbet Company was not entitled to 10 per cent on his labor.

Q. Oh, who was to pay his labor?

A. The Craig Lumber Company.

Q. For maintaining the men of the Hills-Corbet Company while doing the work for them?

A. Yes, sir.

Q. And you made all your charges on that basis, that the Craig Lumber Company had to pay the expenses of conducting this boarding-house for feeding the Hills-Corbet men? A. Yes, sir.

Q. And all the charges of conducting that boarding-house you charged to the Craig Lumber Company? A. Yes, sir.

(Testimony of F. A. Cloudy.)

Q. And all of the extra work which you thought was for the Craig Lumber Company you nevertheless put it on contract because you thought that you had to do that in order to get the 10 per cent for the Hills-Corbet Company? A. Yes, sir.

Q. And you were seeking 10 per cent on work done which was not a part of the contract? [142—68]

A. Yes, sir,—done by Hills-Corbet men?

Q. Yes. A. Yes, sir.

Q. The blue-print that you have offered, did you take that up with you when you went?

A. Yes, sir.

Q. Where was that made? A. In Seattle.

Q. That was made without any previous inspection of the site, or anything of that sort?

A. Not on my part—I never saw the site before I went up; no.

Q. Nor on the part of the man who made the blue-print, so far as you know?

A. Yes, I think Mr. Thurlow for the Hills-Corbet Company had been up there.

Q. He had been up there and prepared the blue-print? A. Yes, sir.

Q. And this is the blue-print as it was attached to the contract at the time of its execution?

A. Yes, sir.

Q. There are some checks here for Mathison at Wrangell for some supplies—those supplies, how did you arrive at the conclusion of whether they were on the contract or not on the contract?

(Testimony of F. A. Cloudy.)

A. If they were for supplies going to the Craig Lumber Company I applied on extra work—they were not on contract.

Q. You didn't write the word "extra" on them at the time the checks were written, apparently—from what information did you put that notation on there?

A. From the bill that was furnished by Mr. Mathison, and where the material was applied.

Q. So that you wrote the checks and sent them in to him, and after they came back—

A. Then I segregated them; yes.

Q. After they came back you determined whether it was a proper charge against the Hills-Corbet Company or the Craig Lumber Company? [143—69] A. Yes, sir.

Q. And so marked it? A. Yes.

Mr. MARSHALL.—I believe that is all.

(Questions by Mr. COBB.)

Q. I want to ask you one or two other questions I omitted to ask. I see, as an example, on February 7, 1918, you drew check No. 91, to the order of A. Vincente, for $71.00, as cook, and marked that Craig Lumber Company—who was he cooking for?

A. Craig Lumber Company.

Q. The Craig Lumber Company? A. Yes.

Q. Whose men was he feeding?

A. Feeding Craig Lumber Company and Hills-Corbet men.

Q. What men did the Craig Lumber Company have there at that time?

(Testimony of F. A. Cloudy.)

A. I don't know just how many men they had there without looking it up.

Q. Did they have any the first of February?

A. I think they had some men there, yes.

Q. During January?

A. Yes; they had some men there that were boarding and not doing anything as far as that is concerned.

Q. How many?

A. I cannot tell you exactly.

Q. You stated a little while ago that they had from four to six. A. Yes; that is it.

Q. Not to exceed that. How many men in the month of January did you have that this man was feeding? A. About 17, including myself.

Q. You made no charge then for a cook at all to the Hills-Corbet Company? A. No.

Q. In other words, all the provisions and feed and the labor of preparing it by the cook, the entire support of the Hills-Corbet [144—70] men was paid by the Craig Lumber Company?

A. Yes, sir.

Q. Charged to them? A. Yes.

Mr. COBB.—That is all.

(Questions by Mr. MARSHALL.)

Q. Just one other question. On one of these Mathieson checks you have here "for material on contract, extra"—what do you mean by that? If it was on the contract and an extra at the same time what was the idea in your mind—

A. That applied to the mill.

(Testimony of F. A. Cloudy.)

Q. You simply meant, then, that it was used in the mill? A. In the mill.

Q. And you do not mean it was on the contract?

A. Extras.

Q. You do not mean it was on the contract at all?

A. No, sir.

Q. You mean it was some extra expense not embraced in the $31,125? A. Yes.

Mr. MARSHALL.—That is all.

Redirect Examination.

(By Mr. HELSELL.)

Q. Mr. Cloudy, state to the Court how you came to be running that boarding-house at all.

A. There was no one left there to run it. Mr. Tromble, as explained a while ago, left on a fifteen minute notice, and made no arrangements for the care of my men or anything else.

Q. Whose boarding-house was it?

A. Craig Lumber Company's.

Q. Who started the boarding-house?

A. Craig Lumber Company.

Q. Was any effort made,—was any account kept under the instructions of Mr. Tromble or anyone else as to what the board cost?

A. No. [145—71]

Q. Or any effort made to segregate the board of your men from the board of the Craig Lumber Company men? A. No, sir, none whatever.

Q. Why not? A. I cannot explain why.

Q. Did Mr. Tromble keep any such record?

(Testimony of F. A. Cloudy.)

A. No.

Q. Did he instruct you to keep any such record?

A. No, he did not.

Q. What did he say to you about how your men were to be fed when you brought them up there?

A. He said the mill company would feed the men.

Mr. COBB.—He said the mill company would feed the men?

The WITNESS.—Yes, sir.

Mr. COBB.—That is, at the boarding-house.

The WITNESS.—Yes, sir.

Mr. COBB.—I object to that, if it is offered for the purpose of varying this contract.

The COURT.—It is offered for the purpose of explaining his actions.

Mr. COBB.—Very well, if that is the purpose of it. If it is offered for the purpose of varying the contract—

Mr. HELSELL.—It does not vary any contract.

Mr. COBB.—Yes, it does—it is an attempt to vary it.

Q. (By Mr. HELSELL.) Did you have a conversation with Mr. Tromble before he left Seattle in regard to this board account? A. I did.

Q. What was that conversation?

A. I asked both Mr. Tromble and Mr. Hills as to who was going to pay the men's board. I was hiring the men and the question of board came up, and one of the men asked me, "How about board?" I turned around to Mr. Tromble and Mr. Hills, who were talking at that time, and I said, "Pardon me,

(Testimony of F. A. Cloudy.)

gentlemen; who is going to pay for the board up there. I am hiring these men and I want to know." Tromble said, "Oh, we take care of the board—we take care of the board." [146—72]

Mr. COBB.—I make the same objection to that. Under the terms of the contract there is no question but what the Hills-Corbet Company was responsible.

Mr. HELSELL.—Under the contract there is no question raised about the board at all—there is nothing said about the board.

The COURT.—These questions are asked simply to illustrate how things happened to be so mixed up—how it was that Mr. Cloudy was representing both parties about the board—that is what I want to have cleared up. I imagine all these questions will be in that line, and I was going to ask the question myself.

Q. (By Mr. HELSELL.) Now, Mr. Cobb asked you if you had ever made a statement to the Craig Lumber Company of your disbursements,—did they have full access to these check-books of yours?

A. At all times; yes, sir.

Q. Did they use that access?

A. They sure did.

Q. Did they go all over them?

A. They sure did, yes, sir.

Q. And never returned them to you?

A. Borrowed my book ledger we kept and never returned that; borrowed my time slips there—those first sheets—I had a sheet like that for every man

(Testimony of F. A. Cloudy.)

from the time that we arrived until the first of May, and all I was able to recover was that amount. I had each man, when he was paid, sign that sheet the end of the month, and those sheets were never returned, and a number of other memoranda that were not returned.

Q. Calling your attention to check stub No. 10, you have marked total check $139.05, and you have written in there later, "not on contract $92.47," have you not? A. Yes, sir.

Q. I understood you to say in answer to Mr. Cobb that you started to segregate all of your checks in that way? A. I did.

Q. And that Mr. Shattuck took them away from you, or got them, anyway, and did not return them to you? [147—73]

A. Borrowed them; yes, sir.

Q. So you did not carry that out throughout your checks? A. No, sir.

Q. But when you did do that, putting two amounts on each stub, that was actually a segregation of what in your opinion should be charged to contract and what should be charged to extras?

A. Yes, sir.

(Whereupon court adjourned until 2 o'clock P. M.)

(Testimony of F. A. Cloudy.)

AFTERNOON SESSION.

March 18, 1920, 2 o'clock P. M.

F. A. CLOUDY on the witness-stand.

Redirect Examination (Cont'd).

(By Mr. HELSELL.)

Q. Mr. Cloudy, when you first came to Craig was the cookhouse already in operation? A. It was.

Q. You had nothing to do with starting it?

A. No.

Q. Or with hiring the original cook that was there? A. No, sir.

Q. When was the first time you ever heard any one connected with the Craig Lumber Company suggest that Hills-Corbet Company was going to be charged with any board?

Mr. COBB.—We object to that as irrelevant and immaterial, when he first heard it.

Mr. HELSELL.—He was there on the ground.

The COURT.—I do not think that is as material as from whom he heard it. I guess that question is merely preliminary—proceed.

Q. When was the first time you heard any suggestion? A. About July.

The COURT.—July 19—

The WITNESS.—1918.

Q. (By Mr. HELSELL.) And from whom did you hear it? A. Henry Shattuck.

Q. Who was Henry Shattuck—what position did he hold? [148—74]

A. I think he was manager of the Craig Lumber

(Testimony of F. A. Cloudy.)

Company following Mr. Tromble.

Q. What statement did he make to you about the board?

A. He just arrived from Seattle and said that he had had a talk with Mr. Corbet and that they entered into a heated argument, and said that Mr. Corbet didn't need to be so cocky, that he could charge them with board if he had so mined to.

Q. If he had so— A. Mined to.

Mr. COBB.—What was that last—I did not understand it.

A. Said he could charge them with board if he had so mined to.

Q. I call your attention to checks Nos. 108 and 109 in your stub-books; what did you do with those two checks? A. What did I do with them?

Q. Yes.

A. This first check was paid to B. F. Book.

Q. What did you do with the checks—to whom did you send them?

A. To Hills-Corbet Company.

Mr. HELSELL.—Those two checks, if the Court please, are two checks which were sent by Mr. Cloudy,—you remember the letter that he wrote enclosing two checks in payment of two invoices, and we have given them credit for those two checks on our bill of particulars. I don't want to be charged twice with that, that is all.

Q. Mr. Cobb has gone into the question with you of how some of these machines were fastened down, and I want to take them up—take up the ones he

(Testimony of F. A. Cloudy.)

mentioned. First, the re-saw—you may state to the Court what it would be necessary to do in order to remove that re-saw from the place where it now stands.

A. Simply take out the lag screws that hold the bed of the re-saw to the floor.

Q. Can it be done without any injury to the building except for the loss of the machine itself?

A. Yes, sir.

Q. And the Atlas engine, how could that be removed? [149—75]

A. By the removal of six nuts from the anchor bolts that bolt it to the foundation.

Q. Then do what?

A. Lift it off the foundation.

Q. Lift it off, and could it be done without any injury to the building itself except the loss of the engine? A. Yes, sir.

Q. And taken out of the building in the same way?

A. Yes, sir.

Q. The same is true of the Frost engine?

A. Yes, sir.

Q. Just take the bolts off and lift it off the foundation? A. Take off the nuts.

Q. Take off the nuts, that is what I meant to say. How about the hand-saw gummer?

A. Unscrew it, that is all.

Mr. COBB.—I don't think it is necessary to waste any time on that. You can take out any fixtures without destroying the building.

(Testimony of F. A. Cloudy.)

The COURT.—It just depends on what your definition of fixtures is.

Mr. COBB.—The Oregon courts hold the rule of fixtures is very liberally applied with reference to mortgagees.

Mr. HELSELL.—Of course this is really in rebuttal of their affirmative defense in which they allege our machinery was attached to the freehold.

The COURT.—I know—proceed.

Q. The gummer—what would you have to do to remove the gummer?

A. It is screwed to the floor.

Q. Just unscrew it? A. Yes, sir.

Q. The iron lathe?

A. That isn't fastened to the floor.

Q. Not fastened at all? A. No, sir.

Q. The dry-kiln equipment, what would you have to do to remove it?

A. Separate the pipe from the header—unjoint the pipe. [150—76]

Q. Just unjoint the pipe? A. Yes, sir.

Q. Is the pipe fastened to anything?

A. Nothing.

Q. Just lying on the foundation?

A. Just lying on the foundation.

Q. All you have to do is to unjoint it and take it out?

A. Yes, sir; disconnect the header from the pipe.

Q. The Coval saw sharpener, what would you have to do to remove that?

The COURT.—I think we could save time to just

(Testimony of F. A. Cloudy.)

ask the one general question about all these machines, if there are any that cannot be removed just state what it is.

Q. Is there any machine there that you installed that cannot be removed by simply taking off the bolts or nuts and taking them out, or unscrewing screws?

A. No.

Q. Can it all be taken out without damaging the building except for the loss of the machinery?

A. Yes, because we put it in there after the building was completed.

Q. How about the boilers—what would you have to do to take those out?

A. Take out a section of the wall that was removable put in there after the building was completed. We had to go ahead with the building, and we had no brick and couldn't brick it in, so we had to leave the boilers outside and went on and completed the building and then we put them in and bricked them in.

Q. What would you have to do to take them out?

A. Remove that section.

Q. I know, but you have some brick around them, haven't you? A. Yes, sir.

Q. What would you have to do to get the boilers out? A. Take down the brick work.

Q. Lift them out?

A. Not lift them. The boilers would simply be moved on the same [151—77] level they now stand on, out on the platform.

Q. You could do that without any damage to the building, could you? A. Yes, sir.

(Testimony of F. A. Cloudy.)

Q. Have you made a computation of the increased area of roof that you actually built by reason of the directions of Mr. Tromble to you to build a complete roof over the whole sawmill? A. Yes, sir.

Q. What percentage of the total roof that you built was the increased area of roof you had to build by reason of Mr. Tromble's change of orders?

A. The increased area, 74.7 per cent of the whole.

Q. In other words, nearly 75 per cent of the work you did on the roof was new work which Mr. Tromble ordered, was it? A. Yes, sir.

Q. I wish you would state what that is.

A. It is a photograph of the west end of the sawmill.

Q. After completion? A. After completion.

Mr. HELSELL.—I offer that in evidence.

Mr. COBB.—I think it is irrelevant and immaterial—just simply encumbering the record.

The COURT.—It simply illustrates his testimony.

(Whereupon said photograph was received in evidence and marked Plaintiff's Exhibit "N.")

Q. How much of the roof that you can see in this picture did you construct?

Mr. COBB.—Now, I think that is wholly irrelevant and immaterial, how much he can see that he constructed. They have testified to 74 and a fraction per cent of the total, and now he is asking how much he can see.

The COURT.—The question could have been answered and all this time saved.

(Testimony of F. A. Cloudy.)

Q. How much of the roof that you can see from that picture did you construct?

A. All that is visible on the north side beyond this slope. [152—78]

Q. What do you mean by the north side?

A. This is the north side.

Q. Did you construct that slope to?

A. Yes, but you can only see the edge of it.

Q. Did you construct the south slope to?

A. Yes, sir.

Q. So you constructed that whole roof, did you?

A. Constructed that whole roof.

Q. Over the whole roof?

A. Yes, sir.

Mr. HELSELL.—That is all.

Recross-examination.

(By Mr. COBB.)

Q. In the first place this sawmill, this building that you put up there, was constructed for the purpose of putting this machinery in, wasn't it?

A. Say that again, please.

Q. I say the building that you constructed there was put up for the purpose of installing this machinery in, wasn't it?

A. Yes; but I could have installed the machinery in the building that they had.

Q. I understand, but you made considerable additions to it? A. Yes, sir.

Q. And it was constructed with the view of installing this sawmill in it as planned? A. Yes.

(Testimony of F. A. Cloudy.)

Q. The building then was adopted for the machinery?

A. The building they had there with the addition we were to add was also adopted for the machinery.

Q. I understand that, but I say the changes you made were all adopted for this machinery and planned so the machinery would fit it, wasn't it?

A. No, the changes was made for the purpose of housing box shooks that they intended to make,—extra space that they wanted. [153—79]

Q. And if you were to take all of this machinery out you would have nothing but a shell of a sawmill left?

A. The shell of a sawmill—birch trees, and all of the wood work would be left.

Mr. COBB.—That is all.

Mr. HELSELL.—That is all.

(Witness excused.)

Testimony of W. W. Corbet, for Petitioner (Recalled).

W. W. CORBET, upon being recalled as a witness on behalf of plaintiff, having been previously duly sworn, testified as follows:

Direct Examination.

(By Mr. HELSELL.)

Q. Showing you Plaintiff's Exhibit "K," I will ask you if you took those two exhibits and segregated the various kinds of labor shown in them and computed the amount of time which was expended on each classification of labor. A. I did.

Q. Have you got a statement with you showing

(Testimony of W. W. Corbet.)

certain classifications of labor which you claim to be outside of the contract? A. Yes.

Q. You have taken the time and the rates per hour, have you not? A. Yes.

Q. And computed the totals on the various classifications of labor? A. Yes.

Q. Is that it which you hand me here? A. Yes.

Mr. HELSELL.—I offer this in evidence.

Mr. COBB.—Well, I have no objection to it going in for what it is worth.

(Whereupon said statement was received in evidence and marked Plaintiff's Exhibit "O.")

Q. In one item here, Mr. Corbet, you have "Mill-Roof"—in figuring the amount on the mill roof what amount did you put in the [154—80] total here?

A. I took the proportion of it that was extra.

Q. And you figured that how?

A. By taking the total amount that was expended on the roof, and taking 74.7 per cent of that as being the amount that was extra.

Q. Now, on the question of board, did you know or were you informed by the Craig Lumber Company at any time that they had charged your account with $1.50 per day for board? A. No.

Mr. COBB.—We object to that as irrelevant and immaterial. That is a question of the construction of the contract.

Mr. HELSELL.—The question of whether we have to pay for it is, but this is an evidentiary matter, whether they ever intended to charge us with it—they

(Testimony of W. W. Corbet.)

would have notified us of the debit some way, or the intention to debit the account with it.

The COURT.—I think it is admissible for what it is worth.

Q. (By Mr. HELSELL.) Did they ever notify you of any charge against you for board?

A. No.

Q. Did you know your men were supposed to pay for board? A. No.

Q. What conversation did you have with Mr. Tromble about board?

Mr. COBB.—We object to that as irrelevant and immaterial, and not admissible for any purpose because it is an attempt to vary the terms of a written contract; and if they are introducing it for the purpose of showing a subsequent oral agreement varying this contract, then it is within the statute of frauds,—and it is not within the pleadings in this case. If they intend to rely upon it to show a waiver of the terms of the contract, then it is without consideration.

Mr. HELSELL.—It is simply offered to show how the parties themselves construed the contract, if the Court please. The contract is silent on the question of board, neither party mentioning it at all, and I am simply offering to show by the mutual conduct of the parties that they construed it as an item which the Craig [155—81] Lumber Company must bear —and intended all the time to bear.

The COURT.—The objection is overruled.

A. While we were discussing the contract in

(Testimony of W. W. Corbet.)

Seattle, at the time the contract was signed—

Q. You are starting to tell now before it was signed?

A. Yes; after we had drawn up the contract.

Mr. COBB.—Then it is not admissible because all the agreements of the parties were afterwards embraced in writing.

The COURT.—How about those matters that are not embraced in the contract?

Mr. COBB.—It is embraced in the contract.

Mr. HELSELL.—There is nothing said about the board in the contract.

Mr. COBB.—The board is a necessary expense, and you guarantee the total cost—

Mr. HELSELL.—If the Court please, the total cost that he refers to is the cost of the things that we were supposed to do.

Mr. COBB.—And among other things you were to furnish the labor for this work, and you cannot furnish labor without boarding it.

The WITNESS.—And it came up then, the question of who was to board the men, as to who were to pay them, came up, and we asked Mr. Tromble about conditions of board up there, how we could manage that, and he said not to worry about that, that the Craig Lumber Company would take care of the board—they had a boarding-house there and would assume that expense.

Q. Did you have more than one conversation along that line?

(Testimony of W. W. Corbet.)

A. Yes; we talked of that at least three times that I know of.

Q. Do you remember Mr. Cloudy testifying to hearing one conversation?

A. That was one of the times.

Q. Was that before or after the signing of the contract?

A. That was before it was signed.

Q. Was there any conversation after it was signed? A. Yes.

Mr. HELSELL.—That is all.

Mr. COBB.—In order to preserve the record on it—I do not know [156—82] whether the record shows it or not—I move to strike out all the conversations with Mr. Tromble about taking care of the board, because it is incompetent, irrelevant and immaterial for any purpose.

The COURT.—The motion is denied.

Mr. COBB.—Exception.

Cross-examination.

(By Mr. COBB.)

Q. I see here in your Exhibit "J" you have charged the Craig Lumber Company with an item of $49.06 for shoveling snow —do you claim that going up to Alaska in December and January to put in a sawmill—install a sawmill—there was no necessity for your shoveling snow?

A. According to the contract that was to have been done before we went there.

Q. You don't know when that snow fell?

(Testimony of W. W. Corbet.)

A. No, I do not.

Q. And you don't know but what it fell some time after you began your work and took charge of the place, do you? A. I know—

Q. Answer my question. A. No.

Q. Certainly you don't. Wood for cookhouse $149.02—how much of that wood was for cooking meals for your own employees?

A. I do not know.

Q. You just charged it all to the Craig Lumber Company. I see you have charged them here with $126.25 for brick from Ravella—what were those brick for? A. For boiler settings.

Mr. HELSELL.—That is for transporting the brick from the ship to the mill site.

Mr. COBB.—You don't say so.

Mr. HELSELL.—Mr. Cloudy testified as to what those terms meant, yesterday.

The COURT.—You mean the brick that were lost by the collapse of [157—83] the dock?

The WITNESS.—That was for taking the brick from the boat and putting them on the dock—both the brick that were lost and the brick that were afterwards sent up.

Q. (By Mr. COBB.) Removing boilers, $49.10—what were the boilers moved for?

A. To be put in the mill.

Q. To be installed? A. Yes.

Q. Were they the boilers you furnished?

A. Yes.

Q. Where did you move them from?

(Testimony of W. W. Corbet.)

A. From the dock.

Mr. HELSELL.—Mr. Cobb, I might call your attention to the fact that this man was not present on the ground—Mr. Cloudy is the man who is familiar with what the work actually consisted of.

Mr. COBB.—Yes, but I am cross-examining this man on an exhibit you put in on his testimony.

Mr. HELSELL.—I understand, but I want to call your attention to the fact that he was not present at Craig at any of this time.

The COURT.—I understood the witness to testify that the sheet you now hold in your hand is a summary made by him from two other exhibits—he hasn't testified that he knew anything about the truth or falsity of those exhibits, but he has testified that that is a summary of what is contained in those exhibits. I did not understand him to testify that he knew the particularities of his own knowledge of those exhibits.

Mr. COBB.—Well, I think I have a right on cross-examination to show the worthlessness of this exhibit as an evidentiary value.

The WITNESS.—This amounts to nothing more than his opinion of what he is chargeable with.

The COURT.—That is what he said at the start.

Mr. COBB.—If that is understood I do not care to cross-examine him on it any further. The fact of it is that it has no evidentiary value that I can see. [158—84]

The COURT.—The only value that has, of course, is the value that any man's testimony would have

(Testimony of W. W. Corbet.)

when he testified that he had examined the records and found something.

Mr. COBB.—I better, perhaps, examine him a little further on it then.

Q. You say these figures you got from a segregation of the figures furnished you by Mr. Cloudy?

A. Yes.

Q. Did you follow his check memoranda?

A. I followed his time-books.

Q. How is that? A. No, I did not.

Q. You did not follow them—you paid no attention to the money that had been furnished to the Hills-Corbet Company on his account, or how he disbursed that? A. No.

Q. There is one other question I forgot to ask you yesterday, and I will ask you that now. Under your contract with the Craig Lumber Company they were to pay you 50 per cent of these invoice prices upon the receipt of the order, were they? A. Yes.

Q. And you stated that on December 8, 1917, they paid you $4020.44, which was 50 per cent of the order under the contract—that was paid in strict compliance with it, was it?

A. I think that included 50 per cent of one invoice —I mean 100 per cent of one invoice, and 50 per cent of a number of invoices.

Mr. HELSELL.—May I interrupt?

Mr. COBB.—Yes.

Mr. HELSELL.—The payment Mr. Cobb is talking about is the first payment made to you.

(Testimony of W. W. Corbet.)

Mr. CORBET.—That is 50 per cent of the invoices that we sent at that time.

Q. (By Mr. COBB.) And on December 17th there was $3812.23 paid, that was paid in compliance with the contract? [159—85]

A. Yes; that was the one, I think, that included 100 per cent of one invoice.

Q. And then on February 1st they paid you $4461.63, that was 50 per cent of the invoices to that date, wasn't it?

A. As I remember it now that was 50 per cent.

Q. How is that?

A. That was 50 per cent of certain invoices—I don't remember just what ones.

Q. And then on February 20th and March 5th there were payments made of $276.51 and $361.45 respectively, which was 100 per cent of the invoices?

A. Read those again, please.

Q. On February 20th and March 5th, respectively, $276.51 and $361.45, those you testified, as I understood you, were in full payment—

A. In full payment of the bill sent out.

Q. They were small orders? A. Yes.

Q. Now, the next payment, March 18th, was $5000.00, was that just 50 per cent—

A. That was simply a sum that was paid on account?

Q. Just a payment made upon account?

A. Yes.

Q. As a matter of fact, at that time under the con-

(Testimony of W. W. Corbet.)

tract they owed you more than $5000, didn't they?

A. Yes.

Q. Did you make any objection to their not living strictly up to the terms of the contract at that time?

A. Yes, we certainly did.

Q. What objections did you make?

A. We wanted more money.

Q. What did you do when you didn't get it?

A. We asked them to get it for us as soon as possible.

Q. They didn't do it, did they? A. No.

Q. What did you do then? [160—86]

A. Kept asking for it.

Q. They didn't make another payment then until July, did they? A. I think not.

Q. And you turned the whole mill over, you say, about May first?

A. It was completed along about that time.

Q. And turned over then?

A. I don't know whether they accepted it or not, but I think so.

Q. And they didn't pay again until July 19th, and only $1000? A. Yes.

Q. And you accepted that and credited them with it? A. Yes.

Q. And on December 8, 1918, they paid you another thousand dollars, and that was the last payment you say they made? A. Yes.

Q. And you accepted that? A. Yes.

Q. You never asked for a return of this property that you claim you never parted with title to until

(Testimony of W. W. Corbet.)

after the bankruptcy proceedings, did you?

A. Yes; we asked for it while it was still in the hands of a receiver.

Q. It went into the hands of a receiver—that was the first time you asked for it, is it?

A. I think so.

Mr. COBB.—That is all.

The COURT.—How long before the bankruptcy proceedings was it that they went into the hands of a receiver? A. I don't know those dates exactly.

The COURT.—The receiver of the Seattle courts?

A. Yes, sir.

Mr. COBB.—The records of this case I think show that.

The COURT.—Very well.

Mr. HELSELL.—I might ask Mr. Corbet this question—did your petition to the receiver ever come to a hearing at all before the [161—87] bankruptcy— A. No, I think not.

Mr. HELSELL.—It was not heard at all.

A. No.

The COURT.—Did you have the company put in the hands of a receiver? A. No.

The COURT.—The Hills-Corbet Company?

A. No.

The COURT.—I understand you to say that you made a petition to the receiver claiming this property? A. Yes.

The COURT.—I think that ought to be introduced in this case.

Mr. COBB.—That petition?

(Testimony of W. W. Corbet.)

The COURT.—Yes, so the Court can see something about when the claim was made to start with—it is a circumstance.

Mr. HELSELL.—We can obtain that—I didn't realize the Court would consider that.

The COURT.—Is it here?

Mr. HELSELL.—I do not know whether it is here or not. You mean when the Hills-Corbet Company filed their petition? I think I have a copy of the petition in my files.

The COURT.—And the date that was filed?

Mr. HELSELL.—Yes. This seems to be the original petition. I guess maybe it was never actually filed. (To witness:) See if that is the original petition, Mr. Corbet?

The WITNESS.—I think it is.

Mr. HELSELL.—I was not familiar with this case at that time, and I do not know whether this or a copy of it was filed or not, but here is what appears to be a copy of the petition filed with the receiver in Seattle.

The COURT.—How far did the receivership go?

Mr. HELSELL.—It didn't go anywhere, because the bankruptcy interrupted it and assumed jurisdiction—this court assumed judisdiction and ousted the receivership.

Mr. COBB.—The receiver of the Superior Court of Washington had no [162—88] jurisdiction over property in this jurisdiction.

The COURT.—I know—it would simply be a circumstance.

Mr. HELSELL.—I do not understand exactly the theory of the Court in asking for that.

The COURT.—I do not insist on it at all. I just simply asked so that I could get an idea of how they acted.

Mr. HELSELL.—They asserted their rights.

Mr. COBB.—I think it is competent for that purpose—it is dated the 10th day of March, 1919.

Mr. HELSELL.—Do you want to put it in?

Mr. COBB.—Yes, to illustrate his testimony.

Mr. HELSELL.—I have no objection if he wants to go and show that we prepared such a petition.

(Whereupon said copy was received in evidence and marked Plaintiff's Exhibit "P.")

Mr. COBB.—That is all.

(Witness excused.)

Mr. HELSELL.—I am offering in evidence a certified copy of our contract which was filed with the United States Commissioner, or Recorder at Ketchikan. At that time there was no statute requiring that it be recorded anywhere, but I want to show that we proceeded with diligence, anyway.

Mr. COBB.—I object to that. The original is in. The fact that they filed a certified copy of it down there—there is no statute authorizing or permitting it to be filed—is wholly irrelevant and immaterial.

The COURT.—I think the same purpose would be accomplished if you have somebody testify that it was filed for record on such and such a day,—there is no use to duplicate it by putting the contract in.

Mr. HELSELL.—I just want the record to show

that we filed it for record in Ketchikan.

The COURT.—Are you willing, Mr. Cobb, that the record may show that it was recorded? [163—89]

Mr. COBB.—Filed there for record but not registered as a chattel mortgage.

Mr. HELSELL.—It was recorded April 9, 1918, with W. T. Mahoney, recorder at Ketchikan. All I know is it says it is a true copy of the record in his office. I do not know where he recorded it. The original says it was recorded in Volume 4 Miscellaneous, page 258.

Mr. COBB.—As long as the original shows that there is no use of this at all.

Mr. HELSELL.—All right—I will stick it in my pocket. I also have a certified copy showing we filed it for record in Seattle. Whether that is of any materiality I do not know—in fact I do not think so, but I thought maybe Mr. Cobb might think so. I want to prove that we asserted our rights in every possible way. If the Court will permit me, I will just read the date it was recorded in Seattle.

Mr. COBB.—I think that is wholly immaterial for any purpose. This was an Alaska contract.

Mr. HELSELL.—It was an Alaska contract and the property was to be delivered in Alaska, and I think under the authorities the Alaska laws control.

Mr. COBB.—Having it recorded down there is wholly irrelevant and immaterial for any purpose in this case.

The COURT.—I do not know, I am sure.

Mr. HELSELL.—The property was bought in Seattle and shipped to Alaska. I will just file it.

The COURT.—If it is immaterial, Mr. Cobb, it cannot hurt anybody; and if it is material they are entitled to it.

(Whereupon said certified copy was received in evidence and marked Plaintiff's Exhibit "Q.")

Plaintiff rests. [164—90]

DEFENSE.

Mr. COBB.—At this time, if the Court please (I do it merely for the purpose of expediting matters), the plaintiff having rested, I move for a dismissal of the petition on the ground that they have utterly failed to show that they are entitled to the relief prayed for, or any relief, under that petition—in other words, they have failed to make out a case.

The COURT.—In what particular, Mr. Cobb?

Mr. COBB.—First, that the contract upon which that petition is based, taken in conjunction with their actions under it, shows conclusively that it was the intention of the parties that title should pass to this property, and it did pass as a matter of law, and that the clause in the contract providing that the title be retained by Hills-Corbet Company until the entire moneys due under the contract should be paid did not have the effect of preventing the title from passing, but was merely an equitable mortgage, which is void as against a trustee and the creditors that he represents. Second, that they have failed to show that the property has not been paid for. I think those two grounds cover it, and I will be very brief because this matter has been argued before the Court once and the authorities presented.

The COURT.—I think you had better go on and

develop your side of the case, Mr. Cobb, because I do not want to pass on this offhand, and I do not want to go over it twice.

Mr. COBB.—I want to state to these gentlemen, then, that the only evidence I expect to introduce and that I will be able to get will be this, I will ask the Court to take judicial notice of the foreclosure of the bank's mortgage in this court and in this case. You will find it in this case, the foreclosure and sale under that. Then I will introduce Mr. A. A. Humfrey as soon as he returns, and the only testimony that I want from him is on the amount of board of these laborers.

Mr. HELSELL.—I will ask, Mr. Cobb, if you want the Court also to take judicial notice of the decision of the referee that the bank's [165—91] mortgage in so far as it was a chattel mortgage was invalid.

Mr. COBB.—On the lumber and everything else there he held it to be valid, and I think he was correct in it, as to the buildings and the fixtures which included this real estate.

Mr. HELSELL.—He held it valid simply as a real estate mortgage.

The COURT.—Does not that all appear in these bankruptcy proceedings? That is a mortgage foreclosed in bankruptcy?

Mr. COBB.—Foreclosed in bankruptcy.

The COURT.—The records are all here?

Mr. COBB.—The records are all here in the hands of the referee.

Mr. HELSELL.—I ask Mr. Cobb if he will not bring the mortgage here so we will have it.

Mr. COBB.—The mortgage is in the hands of the bank.

Mr. HELSELL.—Well, a certified copy of it.

Mr. COBB.—It seems to me it is introduced in evidence—it is recited there.

Mr. HELSELL.—It is very awkward to have the records of some other court considered in this court without knowing what they are—without having a transcript made of them. I think I would prefer that a transcript be made of what parts you want to show.

Mr. COBB.—I will get a copy of it.

Mr. HELSELL.—And file in this court?

Mr. COBB.—Yes, in this court in this case.

The COURT.—I think it will simplify matters, Mr. Cobb, if I give you an order on the referee to turn over to you such papers with reference to the foreclosure of the mortgage as you want, and you can call on the referee and get them and then bring them up here and introduce them in this case,

Mr. COBB.—Yes, I will do that. There is no particular reason for doing it now—I will do it at the time we call Mr. Humfrey, if that is agreeable.

Mr. HELSELL.—I would like to see them before I go away.

Mr. COBB.—All right, you will see them before you go away.

The COURT.—Let me understand what you intend to prove by Mr. Humfrey. [166—92]

Mr. COBB.—Mr. Humfrey was here last evening and he promised to come up this morning, but when I went to get him this morning I learned that he had

left town last night and will not be back for several days. I expect to prove by him just what I stated in the affidavit, that he made this entry and made it from certain data he had there as to the cost of the board of these men to the Craig Lumber Company.

Mr. HELSELL.—Do you know what data he is going to refer to that he had?

Mr. COBB.—No, I do not, in particular.

Mr. HELSELL.—Shall I go ahead with my rebuttal, then?

The COURT.—Yes.

REBUTTAL.

Testimony of F. A. Cloudy, for Petitioner (Recalled in Rebuttal).

F. A. CLOUDY, recalled as witness on behalf of the plaintiff, having been previously duly sworn, testified in rebuttal as follows:

Direct Examination.

(By Mr. HELSELL.)

Q. Mr. Cloudy, in the books of the Craig Lumber Company the Hills-Corbet Company is charged with an item of $1745 on September 30th, which is endorsed as follows: "Cloudy list of checks paid 6/13/18, $100; 6/13/18, $350; 6/18/18, $1000; 6/20/18, $50; 7/19/18, $200; 7/25/18, $200; 8/8/18, $25.00"—do you have any idea of what that is?

A. I don't know,—I don't know what that means.

Q. They have you charged also with the following items—

The COURT.—What is this rebutting, Mr. Helsell?

Mr. HELSELL.—It is not rebutting anything, if they do not intend to put their books in evidence.

The COURT.—Mr. Cobb has not put them in, and he says the only evidence he is going to have—

Mr. HELSELL.—He is going to call Max Humfreys and show him these books, and I don't know how far he is going to go in the books. [167—93] If he is going to confine himself to the two items mentioned in the affidavit I will stop right now.

Mr. COBB.—I have told these gentlemen—I have been very frank with them. I am in the position of representing the trustee, and I found these charges there and I am unable to find who made them or what they are about.

Mr. HELSELL.—When you call Mr. Humfreys are you going to go into any of the debit charges against us except this $11,781.63 for labor and the $3,324 for board? Are you going to have him explain any other items?

Mr. COBB.—No; that is all I now know anything about. If I do I will ask the Court to reopen and give me an opportunity to meet it. I cannot get hold of Mr. Tromble, and I don't know anything about that, and I am not offering incompetent evidence if I know it.

Mr. HELSELL.—I cannot consent that after we go home he can go into all these items in this account unless I can go into them now—it is just one thing or the other, and he ought to be able at this time to decide whether he is going into them or not.

The COURT.—I may have misunderstood, but I

(Testimony of F. A. Cloudy.)

thought you asked Mr. Cobb the categorical question whether he was going beyond the $11,000 item and the $3000 item, and I understood him to say no.

Mr. COBB.—I have no intention of going into it. I know of no evidence I could get on these books. I said, however, that if some evidence should develop that I know nothing about,—these gentlemen understand my position—I have been perfectly frank with them,—If I could get something of that kind I certainly deem it my duty to ask the Court to allow me to put that in, but at the present time I have no intention of doing that.

Mr. HELSELL.—You do not intend to do it with Max Humfreys?

Mr. COBB.—No, not with Max Humfreys because he knows nothing about those,

Mr. HELSELL.—All right.

Mr. COBB.—That is what he tells me, at least.

Mr. HELSELL.—The Court will have to decide whether he will let you do that. [168—94]

Q. (By Mr. HELSELL.) Did you have any conversation with W. H. Warren, cashier of the Bank of Wrangell, about this contract between the Hills-Corbet Company and the Craig Lumber Company?

A. Yes.

Q. When was that?

A. About the 17th of January.

Q. 1918? A. 1918.

Q. State whether at that time Mr. Warren had a copy of the contract between the two companies.

A. Yes; he had Mr. Tromble's copy.

(Testimony of F. A. Cloudy.)

Q. He had it there in the bank? A. Yes, sir.

Q. Mr. Warren was what official in the Bank of Wrangell? A. Vice-president, I understand.

Mr. HELSELL.—I think I am safe in assuming that the mortgage was executed, according to the records, on the 28th of January, 1918—that was the date of the mortgage, if I am not mistaken—is that not true?

Mr. MARSHALL.—I think that is correct—I wouldn't be definite about it.

Q. At that date, January 28, 1918, how much of the Hills-Corbet machinery was actually installed?

A. Installed?

Q. Yes. A. None at all.

Q. None was in place? A. No.

Q. When was it installed?

A. Beginning the first week in March, I believe, we started installing it.

Q. How much of the machinery sold by Hills-Corbet Company was not even in Craig on January 28, 1918?

A. Well, leaving out the brick that was in the bay there was nothing [169—95] there but the resaw, two boilers, two engines and dry kiln equipment—no transmission.

Q. When did the transmission arrive?

A. About the first week in March.

Q. When did the edger arrive?

A. About the middle of March.

Q. The planer?

(Testimony of F. A. Cloudy.)

A. About the same time—it was the same time.

Q. And the belt? A. A. I think the same time.

Q. And the chain?

A. Some chain at the same time,—in fact, I think all of the chain came in on that shipment.

Q. You said the transmission machinery arrived when? A. About the first week in March.

Q. There were two shipments of transmission machinery? A. Yes, sir.

Q. When did the first one arrive?

A. I am not certain about that as to that date—I think in February.

Q. I show you a copy of a telegram and ask you if you know the signature of Mr. W. H. Warren of the Bank of Wrangell? A. Yes, sir.

Q. Does that bear his signature? A. Yes, sir.

Mr. HELSELL.—I offer that in evidence for the purpose of showing that the bank had notice of the terms of our conditional sale contract.

The COURT.—Signature to a telegram?

Mr. HELSELL.—Yes—it is a confirmation of a telegram, sent by mail.

(Whereupon, there being no objection, said telegram was received in evidence and marked Plaintiff's Exhibit "R.")

Q. Do you know whether or not the mill site of the Craig Lumber Company is upon the forest reserve of the United States? A. I think it is; yes.

Q. Is the whole townsite of Craig in the forest reserve of the [170—96] United States?

A. Yes, sir.

(Testimony of F. A. Cloudy.)

Q. Do you know the character of right which the Craig Lumber Company has to buy the land upon which their mill is situated?

Mr. COBB.—What is the purpose of that?

Mr. HELSELL.—My purpose is simply to show, if your Honor please, that the mill is situated on land, the only right to which the Craig Lumber Company has is a permit—a special use permit issued by the United States Forestry Service, and that therefore they were not the owners of the real estate at all, and that the Bank of Wrangell in taking a mortgage on the real estate cannot for that reason claim that they rely upon getting title to the land and that the machinery goes with the land, because they could not get anything but the improvements on the land under their mortgage—it wasn't really a real estate mortgage at all in the sense that they were getting any title to the land.

Mr. COBB.—That is wholly incompetent, irrelevant and immaterial, for this reason, you cannot take a mortgage upon possessory rights in Alaska. Another reason is this, that if these gentlemen owned this property and can show—and apparently have shown—that the Bank of Alaska had notice, why, it is immaterial, they cannot attack a mortgage between their parties unless they can show that the mortgage hurts them.

The COURT.—That is just what he is trying to show, that it hurts him. He is trying to negative your contention that it does not hurt him.

Mr. HELSELL.—If you will admit that it does not

(Testimony of F. A. Cloudy.)

hurt me I will be perfectly satisfied.

Mr. COBB.—I do not think it makes any difference in this case whether there is any mortgage or not.

Mr. HELSELL.—You do not?

Mr. COBB.—No.

Mr. HELSELL.—That is a very frank admission and I am very glad to get it. Don't you know that is all Government land over there, Mr. Cobb and Mr. Marshall? [171—97]

Mr. COBB.—I so understand it—I do not know it.

Mr. MARSHALL.—Have they a permit there?

Mr. HELSELL.—From the Foresty Department.

Mr. MARSHALL.—Yes.

The COURT.—I do not suppose there will be any dispute about this being on forestry ground?

Mr. COBB.—That has always been my understanding.

The COURT.—And that the Craig Lumber Company have a permit?

Mr. COBB.—Have a permit.

The COURT.—And that they have built this mill on that—

Mr. COBB.—The facts as I understand them, and I think I am correct, are that the West Coast Mill, composed of four men as partners, got this permit and built the original mill and Mr. Tromble bought them out, giving each his note for $2.500—no money. Mr. Tromble then sold the West Coast Mill Company's holdings there to the Craig Lumber Company in exchange for the entire stock of the Craig

(Testimony of F. A. Cloudy.)

Lumber Company, and they assumed the notes that he gave these other people. Those are the facts as disclosed by the records in the hands of the trustee.

Mr. HELSELL.—That is all I want to show, that we were occupying that land by license from the Government only.

The COURT.—That is admitted.

Mr. HELSELL.—I have a copy of the permit issued by the forestry service, which I would like to put in evidence.

Mr. COBB.—This is not certified in such a way as to make it admissible.

The COURT.—It is just a permit, isn't it?

Mr. HELSELL.—Permit, certified by the Chief Clerk of the Forestry Department at Ketchikan.

The COURT.—It is admitted in the case, as I understand it.

Mr. HELSELL.—All right; I just want it to be clear that the permit was revocable at the will of the United States, that is all. That is all with this witness, Mr. Cobb. [172—98]

Cross-examination.

(By Mr. COBB.)

Q. Just one question, Mr. Cloudy. Who paid your wages while you were there?

A. The Craig Lumber Company,— when I was paying, or drawing checks I paid myself the same as I did the rest of the men—the same way.

Q. Did you pay yourself out of the checks that you drew on this $10,500 that was deposited in the Bank of Wrangell? A. Yes, sir.

(Testimony of F. A. Cloudy.)

Q. Your wages were all paid out of that?

A. All the wages I did get; yes.

Q. Were they marked "on contract" or otherwise?

A. Some of the men was on contract and some of them were not.

Mr. HELSELL.—He asked you how they were marked,—what do you mean, in the check-books?

Mr. COBB.—Yes; how much of that did you charge the Craig Lumber Company with for your own wages?

A. About a thousand dollars, I guess.

Mr. HELSELL.—Where do you mean—in the check-book stubs? Why don't you make it definite so he will know what you are talking about?

Q. (By Mr. COBB.) How much were you getting a month?

A. I wasn't paid by the month.

Q. How were you paid? A. By the day.

Q. How much a day?

A. Started in with $11, and later they changed it to $12.00.

Mr. COBB.—That is all.

(Witness excused.)

Plaintiff rests. [173—99]

April 3, 1920, 4:20 P. M.

Testimony of A. A. Humfreys, for Respondent.

A. A. HUMFREYS, called as a witness on behalf of the respondent, being first duly sworn, testified as follows:

(Testimony of A. A. Humfreys.)

Direct Examination.

(By Mr. COBB.)

Q. State your name. A. A. A. Humfreys.

Q. During the year 1919 did you reside at Craig, Alaska? A. No, 1918.

Q. 1918,I mean. A. Yes.

Q. When did you first go there?

A. Got there on the first of June.

Q. What connection, if any, did you have with the Craig Lumber Company?

A. When I first went there I was bookkeeper at the plant, and later I had charge of the plant, from the first of August until it closed down.

Q. And acted as treasurer? A. Yes.

Q. Handled funds. Now, how long did your connection with them continue?

A. Until the 28th of December, 1918.

Q. That is the time the receivership—of the appointment of a receiver preceding the bankruptcy proceedings? A. Yes.

Q. That is when they went out of business?

A. Yes.

Q. When you got there and examined the books I will ask you what condition you found the company in with Hills-Corbet Company?

A. At the time I got there it was,—the account was badly balled up—the account with the Hills-Corbet Company—that is, it was hard to get heads or tails of it.

Q. Did you have among the papers the contract of the Hills-Corbet [174—100] Company for the

(Testimony of A. A. Humfreys.)

construction of the plant?

A. Yes; I found that paper sometime after I had been there—I didn't find it at first.

Q. You had it while you were there?

A. I had it; yes.

Q. Did you make any efforts to straighten up the account? A. Oh, yes.

Q. Now, I hand you a couple of books here and ask you what they are, if you know?

A. This book is a ledger—it is really two books in one—this is an accounts receivable ledger and an accounts payable ledger.

Q. What is the other?

A. The other book is a cash journal—both of them books of the Craig Lumber Company.

Q. They are books that were kept under your supervision while you were there? A. Yes.

Q. Now, turning to the account in the ledger there of—

Mr. BURTON.—I would like to ask one question before he asks that. Did you make those entries yourself, Mr. Humfreys?

A. Lots of them, yes—lots of them I didn't make —I can recognize my own entries.

Mr. BURTON.—You didn't make those entries that he has asked you to testify about?

A. I don't know what Mr. Cobb is going to ask me about yet.

Mr. BURTON.—We object to him testifying to any entries except those he made himself.

(Testimony of A. A. Humfreys.)

The COURT.—He has not testified to anything yet.

Q. (By Mr. COBB.) Turn to the account of the Hills-Corbet Company, I call your attention to an entry there of something over $3,000.

A. This last entry on the account?

Q. I don't know whether it is the last entry or not—an entry which you made there. The entry I call your attention to particularly is the entry to cover part of the labor cost, three thousand some hundred dollars—did you make that entry? [175—101]

A. Yes—this last entry of $3,324.00—I made that.

Q. You made that entry. Did you also make it on the journal?

A. Yes, this is my entry in the journal.

Q. Now, just explain that charge against the Hills-Corbet Company to the Court, Mr. Humfreys.

A. Well, this page 47 of the cash journal, the entry referring to $3,324 which appears on the journal as a credit to the boarding-house account and a charge against the Hills-Corbet Company. The entry reads, "Charge Hills-Corbet Company board at $1.50 per day on amount included in the labor charged above"—that is, the previous charge of 2,216 days at $1.50 per day, is $3,324.

Q. Now, that is the entry?

A. That is the entry; yes.

Q. From what data did you make the entry and why did you make the charge?

A. I made this entry when I was closing the

(Testimony of A. A. Humfreys.)

books up preparatory to turning them over to the receivership. When I left Craig and went down to Seattle I took the books with me. The Hills-Corbet Company account, as I said, was always more or less indefinite. For one thing, I didn't have sufficient data to make an accurate account—our account never did come anywhere near balancing; and Mr. Shattuck took the ledger sheet out of the old ledger and what information I had there, and interviewed Hills-Corbet Company in an endeavor to straighten the account out; and when I got back to Seattle in December, 1918, Mr. Shattuck gave me all the details of his straightening the account up with Hills-Corbet Company, one of the main things of which was—one of the main discrepancies was in the amount paid out by the Craig Lumber Company through their representative at Craig, Mr. Cloudy, for labor, that was handed in; and taking the amount of money deposited in the bank of Wrangell in lump sums to the credit of the Hills-Corbet Company, and that which was checked out by their man Cloudy—which always appeared to me to be the chief discrepancy—I asked Mr. Shattuck, —I couldn't go into it at Craig—it was [176—102] hard to get office men at that time—to make up a list of the checks from the check stubs, which he did, and I checked them over with the stubs and with my records.

Q. Is that from the original check stubs that Mr. Cloudy drew from the bank books?

A. Yes.

(Testimony of A. A. Humfreys.)

Q. Those are the same ones that are in evidence now?

Mr. BURTON.—I don't know what you are getting at, Mr. Cobb. I do not think this testimony is at all relevant, if your Honor please, and Mr. Humfreys' answers are not responsive to the questions at all, and I cannot see just what he is getting at, and I think one or two questions would straighten it all out.

The WITNESS.—He asked me how I arrived at this entry, and it was really necessary for me to go into the check stubs to get the entry.

Q. (By Mr. COBB.) You got it from the check stubs?

A. I didn't get the entry direct from the check stubs, but it was originally taken from the data that was contained on the check stub.

Q. The check-book stubs to which you refer are these check-book stubs marked Plaintiff's Exhibit "M" in this case, are they?

A. Yes, those are the check stubs.

Q. How did you get the number of days that you charged them with there,—how did you make that calculation?

Mr. BURTON.—I object to the question as incompetent, irrelevant and immaterial, for the reason that there is nothing shown here that Mr. Humfreys had any right to make the entries which are made in that book; there is nothing shown so far that he had any data from which he could make such original entry; there is nothing to show that

(Testimony of A. A. Humfreys.)

he knew anything about the charge of board or the arrangement concerning board at the time of the making of the contract, and we object to the testimony as being incompetent, irrelevant and immaterial.

The COURT.—The objection is overruled.

The WITNESS.—I took the days as contained on the check stubs and [177—103] time sheets for that time and segregated,—that is, Mr. Shattuck had made the segregation, and I checked it over.

Mr. BURTON.—He is testifying, if the Court please, from something Mr. Shattuck made.

The COURT.—He mentioned incidentally—

The WITNESS.—I took those figures there and I found that the labor performed on the contract amounted to, total number of days for one man 2,216. Now, the board—the operation of the boarding house up until the last two or three months—had always cost a dollar and a half, or in excess of a dollar and a half per day per man,—I think, if I remember correctly, one month it ran up to $1.70 per day per man—I think it ran up to $1.70 one time—but I thought a fair average would be $1.50 a day—it would at least cost that, so that is why I charged the Hills-Corbet Company for the board of their men for the time they worked on the contract.

Q. That is part of the labor charge?

A. Yes.

Q. Made by the Craig Lumber Company?

(Testimony of A. A. Humfreys.)

A. Yes.

Q. Now, the deposits that you referred to that were made by the Craig Lumber Company and checked out by Mr. Cloudy, were three checks for $3,500 each? A. Yes.

Q. Did you find that Mr. Cloudy had checked out, or given checks there that were additional to that that were paid by the bank and charged to the Craig Lumber Company—in excess of that?

A. In excess of the $10,500?

Q. Yes. A. Yes.

Q. Did you make a charge covering that?

A. No, I didn't make the charge.

Q. You didn't make the charge covering that,—do you know how much that access was?

A. According to the charge on the books, yes—it was something between [178—104] six and seven thousand dollars.

Q. That was in addition to the $10,500?

A. Yes. Of course all that money was expended on the labor on the contract, as shown on the check stubs.

Q. I understand—that is the amount that he checked out in the course of his operations. Now, the $3,324, that is a part of the cost to the Craig Lumber Company for the performance of the Hills-Corbet Company contract?

A. I would take it to be so according to the contract—that was my interpretation of the contract, is why I made the entry.

Q. The fact I am asking you about is not the

(Testimony of A. A. Humfreys.)

interpretation of the contract—that was an actual cost to them? A. Oh, absolutely.

Mr. COBB.—You may take the witness.

Cross-examination.

(By Mr. BURTON.)

Q. Mr. Humfreys, these books of check stubs, do they show anything in connection with the board of those men? A. No.

Q. You got nothing from these stubs which gave you any idea as to the board, did you?

A. In just what particular, Mr. Burton?

Q. You made an entry,—you say you made this entry by taking these check stubs and some other information, and figured $1.50 per day per man—now, just answer the question—do these check stubs show anything of that kind in there?

A. They show the amount paid for labor on the contract, Mr. Burton.

Q. Doesn't say anything about board—doesn't mention board, does it?

A. No, it doesn't mention board.

Q. I will ask you, Mr. Humfreys, from whom did you get any information which authorized you to make any entry in those books concerning the board of the Hills-Corbet men?

A. Will you repeat that question? [179—105]

Q. From whom or from what source did you obtain any information or any authority, or who authorized you to make those entries concerning the board of the men against the Hills-Corbet Company?

(Testimony of A. A. Humfreys.)

A. I obtained the information, as I say, from the time the men worked, as shown by their own man's entries.

Q. So you figured this board merely from the fact that you knew that these men of Hills-Corbet Company had put in certain time at that work at Craig, Alaska, and you figured during that time they were to be boarded?

A. I knew they were boarded.

Q. That is the only information upon which you base your charge, that the men worked there and boarded there?

A. No; I asked the superintendent of the Craig Lumber Company, Mr. Tromble, at the time when I was endeavoring to straighten out the accounts,—the main reason for my going to Craig was to straighten out the accounts—I kept them merely from that time on,—and I asked Mr. Tromble,—the boarding-house account was in very, very bad shape financially—that is, the amount that had been collected from the men that were being boarded there was a very small amount in comparison with the expense of operating the boarding-house, and I looked for a reason for it, and Mr. Tromble told me the Hills-Corbet men had all boarded there and no entry of that had been made.

Q. Did he tell you to make that entry?

A. Tromble had gone at the time I made this entry.

Q. You were not present at the time the contract was entered into, were you? A. No.

(Testimony of A. A. Humfreys.)

Q. And you don't know anything, then, about any understanding concerning the board at that time, do you, between the Craig Lumber Company and the Hills-Corbet Company?

A. Only what Mr. Tromble told me.

Q. You were not present at the time the contract was made, and you don't know of your own knowledge? A. No. [180—106]

Q. So all the information you have upon which to make this entry is the fact that these men worked at Craig and boarded there at the boarding-house; isn't that true?

A. Yes, that is partly true.

Q. Now, the amount of $1.50 a day, you fixed that yourself?

A. I fixed the amount myself on the cost of running the boarding-house—that is, what the cost of the boarding-house was—what it cost to feed a man.

Q. Is that your memorandum there?

A. Yes, that is my—

Q. That is your writing. Do you recognize that paper upon which that memorandum is put?

A. Yes.

Q. Now, at that time, Mr. Humfreys, you figured the cost of board would be about a dollar a day, didn't you? A. No.

Q. Isn't that the item down there?

A. That is the amount we charged the men per day for board—our own men, but we were never able to board them for a dollar a day—never—the

(Testimony of A. A. Humfreys.)

lowest, the very lowest, we ever could board our men for was $1.36 a day.

Q. Who authorized you to make the entry in the book?

A. I thought the entry should be made, Mr. Burton, and when I got down to Seattle and started to make all the entries in the book preparatory to turning them over to the receiver, I said to Mr. Shattuck, "Shouldn't a charge for board be made?" I told him my reasons for thinking a charge should be made, and he said yes, and so I made them. Mr. Shattuck was at that time president of the company.

Q. Mr. Cobb asked you concerning the three checks for $3,500? A. Yes.

Q. What are the entries concerning those checks?

A. The entries for those checks are not in these books—they are in the previous set of books to these.

Q. Who were those checks payable to—Cloudy? [181—107]

A. No, the checks were payable to the Hills-Corbet Company.

Q. Do you know what those checks were paid for?

A. They were merely deposited in the bank for Cloudy to check against, Mr. Burton,—money to pay the men.

Q. You haven't seen the time-books, have you, of the Hills-Corbet Company kept by Cloudy?

(Testimony of A. A. Humfreys.)

A. No; I tried many times to get hold of them but I couldn't.

Q. You don't know of your own knowledge what amount of money was paid upon the contract or what was paid upon extras, do you?

A. That all transpired before I got there. The only thing I could tell was from Cloudy's own check stubs.

Q. You don't pretend to know, though, what that money was paid for—whether it was paid for the dry kiln, the foundation for the boiler, the shoveling of snow, or what it was paid for, do you?

A. No; just the entries on his check stubs was all I had to go by.

Q. You were not there at all during the time this work was being performed, were you, Mr. Humfreys?

A. The bulk of the work was finished when I got there. There was some work done after I got there.

Q. They left in June, didn't they—the Hills-Corbet men?

A. No; there were some of them there up to the time I left.

Q. The work was completed at that time?

A. No, the work was never completed—it is not completed yet. The dry kiln was never completed, for one thing, and there are several other things that were never completed.

Mr. BURTON.—Of course I cannot go into that —that is not proper rebuttal testimony. What I mean by that, Mr. Humfreys is injecting something

(Testimony of A. A. Humfreys.)

that cannot be answered by our witnesses.

Q. You met Mr. Cloudy in Ketchikan, did you not, Mr. Humfreys? A. This trip?

Q. Yes. A. Yes.

Q. Didn't you tell him you had made no entries in this book at all, at Ketchikan?

A. Just a few days ago? [182—108]

Q. Yes.

A. No; I didn't discuss that question with Mr. Cloudy.

Q. You didn't tell him that at all?

A. I didn't talk to him to any extent. He told me they were all harping on me because I left town when the trial was coming up—that was all. I didn't have any detailed discussion with him—only saw him on the dock for two or three minutes.

Q. Didn't Mr. Cloudy tell you at that time that the entries referred to in Mr. Cobb's affidavit were not made by you at all in the book?

A. No, he didn't say anything about it.

Q. Didn't you make that statement to Mr. Cloudy, in Ketchikan, a few days ago, that you had not made those entries Mr. Cobb referred to in his affidavit?

A. No; I haven't seen any affidavit of Mr. Cobb.

Q. You just testified a few minutes ago about those entries, Mr. Humfreys, and you say you don't know a thing about what the money was paid for—I understood you to say that,—you don't know a thing at all about that money there, that is true, isn't it?

(Testimony of A. A. Humfreys.)

Mr. COBB.—I do not think there is any use duplicating the record in this way. The witness has stated repeatedly what data he made these entries from—from the entries made by Mr. Cloudy.

The WITNESS.—I discussed this matter with all the men that were interested there,—I wasn't right on the spot.

Q. All the information you got was from these check stubs of Mr. Cloudy?

A. No—that is binding me down pretty close, Mr. Burton.

Q. Tell me what information you got, and from whom?

A. Out at Craig there were quite a few other papers—more than there are here.

Q. Where are those papers?

A. I presume they are out at Craig now—they were when I left there. Where they are now I don't know.

Q. You were there last, weren't you? [183—109]

A. No, I think I left Craig the 15th, or the 14th, of December, 1918; but the check stubs occupied an important part in the data upon which I based different entries in the books—also a conference with the man who wrote the checks himself assisted me too at that time.

Q. Who was the man? A. Mr. Cloudy.

Mr. BURTON.—If the Court please, Mr. Cloudy left word before he left here—left me a letter—that if any testimony came up, or was given by Mr. Humfreys that should be rebutted he would

(Testimony of A. A. Humfreys.)

come back, and I would like that privilege,—if the Court thinks there is any testimony that should be rebutted I would like to have Mr. Cloudy recalled.

The COURT.—Do you want to have Mr. Cloudy here?

Mr. BURTON.—If there is any material evidence which the Court wants explained I would like to have him here.

The COURT.—You will have to be the judge of that.

Q. Now, Mr. Humfreys, just let us get the thing clear,—you state to the Court right now from what you derived the information—not hearsay testimony—you understand what that is,—but from what authentic source you derived any information that authorized you to make in the books those entries against the Hills-Corbet Company,—you understand that question?

A. I understand it. I asked Cloudy, the man who wrote those checks, and the man who was in charge of that work at the time the work was performed, and I asked Mr. Tromble, who was superintendent of the plant at the time the work was performed—I am perfectly frank in this matter, Mr. Burton, I have no interest in it one way or the other—it occurred to me that the boarding-house account was in terribly bad shape—it showed a tremendous deficit, and I asked Mr. Tromble about it. He said, "The boarding-house account is so far behind," he said, "I don't know—there are lots of people who

(Testimony of A. A. Humfreys.)

were eating there and nothing charged." I said, "Who, for instance?" He said, "The Hills-Corbet people." I said, "Are we supposed to pay [184—110] their board?" He said, "No." I said, "How am I going to charge it?" And he said, "You will have to see Cloudy—dig it out from them." I said, "That is going to be an awful job—I don't know how I am going to get it." Then these check stubs were produced, of Mr. Cloudy's and I saw that was going to be a very big job and I could see very plainly that I was never going to get time to do it with my other work—I was working then 16 to 18 hours a day—and I said to Shattuck, "You take this stuff to Seattle with you and work it out"; and I said, "Send me a list of the checks," and he did send a typewritten list of the checks, but he did not send the check stubs, and I decided to let it go until I got to Seattle, and when I got to Seattle I got the check stubs and checked them over with this list and figured out as near as I could the total number of days and the men that had done work; then I showed Mr. Shattuck what the cost of operating the boarding-house had been spread over the period I had figured out, showed him the deficit of the boarding-house, and showed that the operating cost had been high, and I figured a fair average would be $1.60 for each man, and I said to Shattuck, "I guess it would be all right, fair enough, if I charge the board to the Hills-Corbet Company at $1.50 a day," and he said yes, so I made the entry. That is the whole story.

(Testimony of A. A. Humfreys.)

Q. Cloudy did not tell you to make the entry?

A. No, he had no authority.

Q. Cloudy did not tell you that the Hills-Corbet Company were responsible for board, did he? You are referring to Mr. Tromble—Mr. Tromble is the one you had the talk with?

A. Yes, I had most of the talk with Mr. Tromble, but I had some talk with Mr. Cloudy. At that time Mr. Cloudy was working for us—he wasn't working for the Hills-Corbet Company at that time.

Mr. BURTON.—That is all.

(Witness excused.)

TESTIMONY CLOSED. [185]

Plaintiff's Exhibit "E."

Craig, Alaska, Dec. 9, 1917.

Hills Corbet,
Seattle, Wash.

Dear Sirs—

Inclosed please find check for the following Invoices:

#250	9.40	18.80
249	48.71	97.42
248	25.75	51.50
247	625.12	1250.24
237	35.01	70.02
236	137.79	275.58
238	210.45	420.90
238	15.46	30.92
251	10.21	20.42
233	728.34	1456.68

224..... 110.69..... 221.38
243..... 66.41..... 132.82
241..... 999.03.....1998.06
312.50
F. A. Cloudy.....477.36.....Extra Fares from Seattle.

3812.23

I telegraphed you to reorder all the brick Cloudy told you about it I guess. Its a pretty hard blow. I wish in reinvoicing that you could forget your 15% & 10% profit. This is all I will ask of you. Cloudy feels terrible about this. He was trying to save money & the brick were on a new wharf & I was as willing he should take the chance as he. You hadent better waste any time getting brick.

Yours truly,
F. J. TROMBLE.

Pltffs. Exhibit *No.* "E." Received in Evidence Mar. 17, 1920. In Cause No. 31, Bkcy. J. W. Bell, Clerk. By ————, Deputy. [186]

Plaintiff's Exhibit "F."

Length	Belt	Where At.
54½	20″	Saw Engine.
58½	20″	Edger Engine.
16 feet	7″	Feed Drive Belt.
10′.8″	7″	Feed Drive Belt.
30′	16″	Feed Drive Belt.
23′	6″	Diamond Drive Belts.
38′	8″	Fan Drive Belt.
24½	6″	Small Conveyor Belt.
33′	12″	Planer Reverse Drive.
24′	8″	Drive Belt (planer).
24′	10″	Planer Drive Belt.
25′	7″	Reserve Rev. Drive.
55′ 8′	6″	Box Factory Reserve Drive.
42	7″	Cut Off Saw Res. Drive.
11′	8″	Cut Off Saw Res. Belt.
13′	8″	Cut Off Saw Res. Belt.
26′	7″	Reserve Drive Belt.
28′	6″	Box Factory Drive Belt.
13′	6″	Rip Saw Drive Belt.
12½	6″	Cut Off Saw Drive.
12′	8″	Cut Off Saw Blt.
44′	12″	Mule Stand Drive.
15′	8″	Large Conveyor Drive.
44′	8″	Large Conveyor Drive Blt.
30′	7″	Log Haul Drive Blt No. 1.
26′	7″	Live Roll Drive Belt.
23′	12″	Log Haul Drive No. 2.
24′	8″	Carriage Feed Drive.
20′	10″	Haul Drive No. 3.
43′	12″	Head Saw Main Drive.
40	7″	Canting Gear.

Pltffs. Exhibit *No.* "F." Received in evidence Mar. 18, 1920. In Cause No. 31, Bkcy. J. W. Bell, Clerk. By ————, Deputy. For Idtf. (3). J. W. Bell, Clerk. [187]

Plaintiff's Exhibit "G."

OFFICE OF
CRAIG CHAMBER OF COMMERCE.

Craig, Alaska, Feb. 9, 1918.

Hills Corbet Co.,
Seattle.

Gentlemen:

Enclosed please find Two checks, #108 and 109 for $276.51 acct, your orders #291–300, 301, 302 and 303.

Tromble still away getting along fine Hand about well can use it as you can see.

Send Feed Rings for dutch ovens (3) not over 12″ inside can get along until they come.

Respectfully yours,
F. A. CLOUDY.

Pltfs. Ex. *No.* "G." Received in evidence Mar. 17, 1920. In Cause No. 31, Bkcy. J. W. Bell, Clerk. By ————, Deputy. [188]

Plaintiff's Exhibit "H."

Craig, Alaska, Feb. 25, 1918.

Hills Corbet Co.,
73 Horton St., Seattle, Wn.,

Gentlemen:—

Enclosed please find check for $361.45 which I

consider is in full for your invoices Nos. 296, 305 and 306.

I cannot allow you a percentage on that block, and as for the boom chains which were an actual loss to me, I don't think you can expect anything on that. As I explained before, this order had nothing to do with the Mill, and if I had to pay you a percentage, we would have to pay the difference ourselves.

I could have ordered these things from the Mills and Mines Supply Co., while down there, and I surely will consider it very unfriendly to make such a charge. Hoping that this will be satisfactory to you,

We remain,

Sincerely yours,

CRAIG LUMBER CO.,

F. J. TROMBLE,

Mgr.

P. S.—The Ravalli has just arrived at this place and there does not appear to be anything on board for us. This does not appear to be very good headwork on your part.

F. JT/K.

Pltfs. Exhibit *No.* "H." Received in evidence Mar. 17, 1920. Cause No. 31, Bkcy. J. W. Bell, Clerk. By ————, Deputy. [189]

Plaintiff's Exhibit "O."

Labor not on Contract.

Saw Mill	273.87
Shoveling Snow	49.06
Wood for Cook House	149.02
Brick from Ravella	126.25
Removing Boiler	49.10
Dry Kiln Foundation	217.89
Removing Lumber	8.10
Replacing Water-pipe	120.47
Mill Roof	408.05
Clearing Platform	58.26
Removing Engine	28.92
Lumber order	5.25
Removing Machinery from Dock	85.35
Gravel	153.89
Sand	154.00
Removing Engine	9.00
Mill Foundation	10.25
Boiler House Foundation	340.97
Tearing down Saw Mill	283.03
Papering Mill Roof	40.67
Trussing Mill	242.35
Carriage	98.86
Logging	18.00
Stevens Residence	4.50
Pipe Line to Cook House	19.35
Brick Shed	1.20
Log Slip	59.06
Log Pond	52.87
Water Tank	39.65
	3098.24

Pltfs. Exhibit *No.* "O." Received in evidence Mar. 18, 1920. Cause No. 31, Bkcy. J. W. Bell, Clerk. By ————, Deputy. [190]

Defendant's Exhibit No. 1.

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No. 93.

Wrangel, Alaska, Jan. 5, 1918.

BANK OF ALASKA.

Pay to The Order of Hills-Corbet-Co. Per F. A. Cloudy $3500.00/100 Three Thousand Five Hundred and 00/100 Dollars.

CRAIG LUMBER CO.
F. J. TROMBLE, Mgr.

Stamped: Paid Jan. 17, 1918. Bank of Alaska, Wrangell, Alaska. Per F. A. Cloudy.

No. 94.

Wrangell Alaska, Jan. 24, 1918.

BANK OF ALASKA.

Pay to the Order of Hills-Corbet Co. By F. A. Cloudy, $3500.00/100. Three Thousand Five Hundred and 00/100 Dollars.

CRAIG LUMBER CO,
Per F. A. CLOUDY.

Acct. contract on sawmill at Craig, Alaska.

Stamped: Paid Feb. 21, 1918. Bank of Alaska, Wrangell, Alaska.

[Endorsed]: Hills-Corbet Co. By F. A. Cloudy.

No. 401.

Craig, Alaska, March 26, 1918.

CRAIG LUMBER CO.

Of Craig, Alaska.

Pay to The Order of Hills-Corbet Co. Act. $3500.-00/100, Thirty-five Hundred and no/100 Dollars.

CRAIG LUMBER CO., President.

ANNA K. TROMBLE, Treasurer.

(To Bank of Alaska, Wrangell, Alaska. Stamped: Paid Apr. 29, 1918. Bank of Alaska, Wrangell, Alaska.)

Dft. Exhibit No. 1. Received in evidence Mar. 18, 1920. In Cause No. 31, Bkcy. J. W. Bell, Clerk. By ————, Deputy. [191]

No. 1. $25.00/100
Jan. 18, 1918.
ORDER of
F. A. Cloudy. H–C–Co. Hills Corbet.
Counter Check.
For Expenses Craig, Alaska,
to Wrangell and return.

No. 2. $182.62
Jan. 21, 1918.
Not in Contract. $118.62 Dec.
On Contract. 64.00 Nov. & Dec.
P. J. Hangen. Hills Corbet.
For Labor on contract.
Hills-Corbet Co. Nov. 27 to
Dec. 31/17.

No. 3. $89.40
Jan. 21, 1918.
ORDER of
John Scott. Hills Corbet.
Not on contract. $44.40
On " 45.00
For Labor on contract.
Hills-Corbet Co. Nov. 27 to
Dec. 31/17.

No. 4. $170.92 + #17 by error.
12.20
Jan. 21, 1918.
ORDER of
W. M. Benn. N. O. C. 109.67
Labor on Contract,
O. C. 61.25
" " 12.20=73.45 Hills Corbet.
For Hills Corbet Co.;
Nov. 27 to Dec. 31–17.
Due $12.20.

No. 5. $138.37
Jan. 21, 1918.
ORDER of
Robert Walker,
N. O. C. 95.62
O. C. 442.75 Hills Corbet.
Labor on contract.
For Hills Corbet Co.:
Nov. 27 to Dec. 31–17. [192]

No. 6. $136.32
Jan. 21, 1918.
ORDER of
O. M. Sweatt. N. O. C. 98.10
O. C. 38.22 Hills Corbet.
Labor on contract.
For Hills Corbet Co.;
Nov. 27 to Dec. 31–17.

No. 7. $76.30
Jan. 21, 1918.
ORDER of
N. O. C. 76.30
T. G. Rorhstrum.
For labor on contract.
Hills Corbet Co. Hills Corbet.
Dec. 5th to Dec. 31–17.

No. 8. $135.90
Jan. 21, 1918.
ORDER of
Albert McClellan.
Not on contract. $104.23
on contract. 31.67
For labor on contract.
Hills Corbet Co. Hills Corbet.
Nov. 27 to Dec. 31–17.

No. 9. $140.17
Jan. 21, 1918.
ORDER of
Carl F. Pahl. N. O. C. 92.47
Labor on contract . 47.70 Hills Corbet.
For Hills-Corbet Co.
Nov. 27 to Dec. 31–17.

No. 10. $139.05
Jan. 21, 1918.
ORDER of
W. C. Cloudy.
Not on contract. 92.47
For labor on contract 46.58 Hills Corbet.
Hills Corbet Co.;
Nov. 27 to Dec. 31–17. [193]

No. 11. $96.40
Jan. 21, 1918.
ORDER of
Wm. W. Kilworth acct.
J. E. Simpson. N. O. C. 96.40 Mailed to Wm. W. Kilworth by request
For labor on contract. 34.00 of Simpson.
Hills Corbet Co.;
Nov. 27 to Dec. 31–17. Hills Corbet.

No. 12. $226.61
Jan. 21, 1918.
ORDER of
H. J. Gibney.
Not on contract. 197.75
For labor on contract. 92.87..... Due 2 days on Dec.
Hills Corbet Co. Hills Corbet.
Nov. 27 to Dec. 31–17.

No. 13. $136.59
Jan. 21, 1918.

ORDER of
E. Eckengen. N. O. C. 98.55
O. C. 38.02
For labor on contract Hills Corbet Co. Nov. 27 to Dec. 31–17. Hills Corbet.

No. 14. $140.17
Jan. 21, 1918.
ORDER of
Theo Barth.
Not on contract. 106.42
For Labor on contract. 33.75 Hills Corbet.
Hills Corbet Co.;
Nov. 27 to Dec. 31–17.

No. 15. $140.75
34.23
Jan. 21, 1918.
ORDER of
C. S. Cloudy.
Not on contract. 90.67
For Labor on contract. 34.23

124.90 Hills Corbet.
Hills Corbet Co.
Nov. 27 to Dec. 31–17. [194]

No. 16. $360.20
Jan. 21, 1918.
ORDER of
F. A. Cloudy. N. O. C. 338.90
For Labor on contract. 36.30 Mistake Deducting.
Hills Corbet Co. short 5.00.
Nov. 27 to Dec. 31–17.

Hills Corbet.

No. 17. $12.20
Jan. 21, 1918.
ORDER of
W. M. Benn.
For labor on contract.
Hills Corbet.
Due on Dec.–17.

See stub #4 on contract.
Due on Dec. acct. error.
Hills Corbet.

No. 18. $19.80
Jan. 21, 1918.
ORDER of
F. A. Cloudy.
Acct. D. O. Quine.
For labor on contract. $19.80
Hills Corbet Co.
Nov. 27 to Dec. 1.

Check #787 Taylor Mill Co. to F. A. Cloudy.
Hills Corbet.

No. 20. $13.35
Jan. 21, 1918.
ORDER of
A. L. Brown.
Acct. Chas. Spencer.
For (cook) West Coast Mill Co.
Per F. A. Cloudy.

Not on contract.
Hills Corbet.

No. 21. $234.52
Jan. 21, 1918.
ORDER of
L. K. Halvorsen.
Acct. A. J. Eadner.
For labor on contract.
For Hills-Corbet Co.;
Nov. 27 to Jan. 11/18.

Hills Corbet.

No. 22. $50.00
Jan. 21, 1918.
ORDER of
L. K. Halverson.
T. Lempie.
For labor on contract. Hills Corbet.
Hills Corbet Co.
Dec. 17 to Jan. 1
1917 1918. [195]

No. 23. $15.50
Jan. 22, 1918.
ORDER of
W. Waters. Hills Corbet.
Hills Corbet Co. Check.
For fare and Freight.
Wrangell to Craig.

No. 24. $25.42
Jan. 22, 1918.
ORDER of
F. A. Cloudy acct.
For B. F. Bink, labor on contract.
Hills Corbet Co. Hills Corbet.
on acct. Jan. 7/18.

No. 25. $77.85
Jan. 22, 1918.
ORDER of
O. M. Sweatt. Hills Corbet.
Labor on contract Hills Corbet.
For Jan. 1 to Jan. 19th incl.

No. 26. $76.50
Jan. 22, 1918.
ORDER of
Robert Walker.
Labor on contract.
Hills Corbet. Hills Corbet.
For Jan. 1 to Jan. 20.

No. 27. $66.50
Jan. 22, 1918.
Order of
Theo. Barth.
Labor on contract Hills Hills Corbet.
Corbet.
Jan. 1 to Jan 20.

No. 28. $10.00
(Part of #27.)
Jan. 22, 1918.
Order of
Theo Barth.
Labor on contract.
Hills Corbet Co. Hills Corbet.
Jan. 1 to Jan. 20.

No. 29. $76.50
Jan. 22, 1918.
Order of
Elmer Eckengren.
Labor on contract.
Hills Corbet Co. Hills Corbet.
Jan. 1 to Jany. 20.

No. 30. $105.50
Jan. 22, 1918.
Order of
W. M. Benn.
Labor on contract Hills
Corbet Co. Hills Corbet.
For Jan. 1 to Jan. 20.

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No. 31. $5.00
Jan. 22, 1918.
Order of
W. M. Benn.
Labor on Contract Hills Corbet.
Jan. 1 to Jan. 20.
Advance.
Hills Corbet.
Cash advanced by F. A. Cloudy.

No. 32. $100.50
Jan. 1918.
Order of
P. S. Hangen.
Labor as contract Hills Corbet.
For Jan. 1 to Jan. 20.
Hills Corbet.

No. 33. $10.00
Jan. 22, 1918.
Order of
P. L. Hangen.
Labor on contract Hills Corbet Co.
Jan. 1 to Jan. 20.
Cash advanced by F. A. C.
Hills Corbet.

No. 34. $75–50
Jan. 22, 1918.
Order of
L. G. Rothstrom.
Labor on Contract for Hills Corbet Co.
Jan. 1 to Jan. 20.
Hills Corbet.

No. 35. $1.00
Jan. 22, 1918.
Order of
L. G. Rothstrom.
Labor on contract.
For Jan. 1 to Jan. 20.
Hills Corbet.
Cash advanced by F. A. Cloudy.

No. 36. $36.44
Jan. 22, 1918.
Order of
W. M. Benn.
Labor on contract Hills Corbet Co.
Jan. 20 to Jan. 27.
Hills Corbet.

No. 37. $36.44
Jan. 22, 1918.
Order of
P. S. Hangen.
Labor on contract.
Hills Corbet Co.
Jan. 20 to Jan. 27.
Hills Corbet.

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No. 38. $69.20
Jan. 22, 1918.
Order of
J. E. Simpson.
Labor on contract.
Hills Corbet Co.
Jan. 1 to Jan. 20.
Hills Corbet.

No. 39. $139.62
Jan. 22, 1918.
Order of
H. J. Gibney.
Labor on contract.
Hills Corbet Co.
Jan. 1 to Jan. 20.
Due $10.00.
Hills Corbet.

No. 40. $10.00
Jan. 22, 1918.
Order of
H. J. Gibney.
Labor on contract.
Hills Corbet Co.
Jan. 1 to Jan. 20.
Hills Corbet.

No. 41. $65.85
Jan. 22, 1918.
Order of
C. F. Pahl.
Labor on contract. Hills Corbet.
Hills Corbet Co.
Jan. 1 to Jan. 20/17.

No. 42. $77.85
Jan. 22, 1918.
Order of
Albert McClellan.
Labor on contract. Hills Corbet.
Hills Corbet Co.
Jan. 1 to Jan. 20.

No. 43. $75.85
Jan. 22, 1918.
Order of
W. C. Cloudy.
Labor on contract. Hills Corbet.
Hills Corbet.
Jan. 1 to Jan. 20.

No. 44. $72.85
Jan. 22, 1918.
Order of
C. S. Cloudy.
Labor on contract. Hills Corbet.
Hills Corbet Co.
Jan. 1–20. [198]

No. 45. $22.50
Jan. 24, 1918.
Order of
St. Michael Trading Co.
For 3 kegs nails. Hills Corbet.
1–18–18.
Hills Corbet Co.

No. 46. $73.00
Jan. 24, 1918.
Order of
F. Matheson.
2 keds 40 dy common wire nails 14.00
3 keds 60 dy common wire nails 21.00
4 roll J. M. Asbestos Roofing 1 sq.
3 ply 25.00
2 roll Regal Roofing 1 sq. 2 ply 7.00 Hills Corbet Co.
5 gals. Roofing Paint 6.00

Jan. 18–1918. 73.00

No. A 4. $3500. no/100
Jan. 24, 1918.
Order of
(Hills Corbet Co. by F. A. Cloudy.)
For labor on contract.
Saw mill at Craig. Craig Lbr. Co.

No. 47. $3.60
Jan. 24, 1918.
Order of
W. H. Killworth.
acct. E. Simpson.
For labor on contract. Hills Corbet.
Hills Corbet.
Bal. due to date on order by Simpson.

No. 48. $5.20
Jan. 24, 1918.
Order of
J. E. Simpson.
For labor on contract.
For Hills Corbet Co. Hills Corbet.
In full of acct. Nov. 27 to Dec. 22. Out Standing.

No. 49. $27.00
Jan. 26, 1918.
Order of
Robert Walker.
Labor on contract.
For week ending Jan. 26/18.
Hills Corbet.

No. 50. $27.00
Jan. 26, 1918.
Order of
Elmer Eckengren.
Labor on contract week ending Jan. 26–18.
Hills Corbet Co.

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No. 51. $39.00
Jan. 26, 1918.
Order of
W. M. Benn.
Labor on contract.
For week ending Jan. 26–18.
Hills Corbet.

No. 52. $39.00
Jan. 26, 1918.
Order of
P. S. Hangen.
Labor on contract.
For week ending
Jan. 26–18.
Hills Corbet.

No. 53. $27.00
Jan. 26, 1918.
Order of
L. S. Rothstrom.
Labor on contract.
For week ending Jan. 26–18.
Hills Corbet.

No. 54. $42.00
Jan. 26, 1918.
Order of
H. J. Gibney. Hills Corbet.
Labor on contract.
For week ending.
Jan. 26/18.

No. 55. $27.00
Jan. 26, 1918.
Order of
C. F. Pahl. Hills Corbet.
For labor on contract.
For week ending.
Jan. 26/18.

No. 56. $27.00
Jan. 26, 1918.
Order of Hills Corbet.
Albert McClellan.
Labor on contract.
For week ending Jan. 26–18.

No. 57. $27.00
Jan. 26, 1918.
Order of
O. M. Sweatt.
Labor on contract. Hills Corbet.
For week ending Jan. 26–18. [200]

No. 58. $27.00
Jan. 26, 1918.
Order of Hills Corbet.
W. C. Cloudy.
Labor on contract.
For week ending Jan. 26–18.

No. 59. $18.00
Jan. 26, 1918.
Order of Hills Corbet.
Theo. Barth.
Labor on contract.
For week ending Jan. 26/18.

No. 60. $27.00
Jan. 26, 1918.
Order of
C. S. Cloudy. Hills Corbet.
Labor on contract.
For week ending Jan. 26–18.

No. 61. $7.00
Jan. 26, 1918.
Order of
H. J. Gibney. Hills Corbet.
Labor on contract.
For bal. due on week ending
Jan. 26–18.

No. A 5. $10.00
Jan. 28, 1918.
Order of
A. Agniler. Not on contract.
Acct. A. Vicente. Craig Lbr. Co.
For Cook.
Craig Lbr. Co.

No. A 6. $2245.66
Jan. 30, 1918.
Order of S. S. Wainwright.
Pacific Coast S. S. Co. Craig Lbr. Co.
Freight Seattle to Craig.
Craig Lumber Co.
Check.

No. 62. $15.75
Jan. 31, 1918.
Order of Craig Lbr. Co.
P. Lusco.
Longshoring.
For acct. Brick and machinery.

No. 63. $14.25
Jan. 31, 1918.
Order of Craig Lbr. Co.
E. Johnson.
Longshoring. [201]

No. 64. $15.75
Jan. 31, 1918.
Order of Craig Lbr. Co.
Geo. Martz.
Longshoring.
For acct. Brick, etc.

No. 65. $15.75
Jan. 31, 1918.
Order of
Longshoring. Craig Lbr. Co.
acc. Brick.
For Fank Van Vlett.

No. 66. $15.75
Jan. 31, 1918.
Order of Craig Lbr. Co.
Robert Scott.
Longshoring.
For brich etc.

No. 67. $14.75
Jan. 31, 1918.
Order of
David Parnell.
Longshoring.
For Brick, etc.
Craig Lbr. Co.

No. 68. $15.75
Jan. 31, 1918.
Out Standing.
Order of
Herman West.
Longshoring acct. Brick etc.
Craig Lumber Co.

No. 69. $15.75
Jan. 31, 1918.
Order of
Antone Andersen.
Longshoring.
acct. Brick etc.
Craig Lbr. Co.

No. 70. $15.75
Jan. 31, 1918.
Order of
John Rose.
Longshoring.
acct. Brick.
Craig Lbr. Co.

No. 71. $15.75
Jan. 31, 1918.
Order of
Peter John.
Longshoring acct. brick etc.
Craig Lbr. Co.

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No. 72. $75.00
Jan. 31, 1918.
Out Standing.
Order of
E. Wright.
For Flunkey.
Craig Lbr. Co.

No. 73. $15.75
Jan. 31, 1918.
Order of Craig Lbr. Co.
Andy Andersen.
Longshoring Brick etc.

No. 74. $27.00
Feb. 2, 1918.
Order of Hills Corbet Co.
L. S. Rothstrom.
Labor on contract for week ending Feb. 2–1918.

No. 75. $27.00
Feb. 2, 1918.
Order of Hills Corbet Co.
Robert Walker.
Labor on contract for week ending Feb. 2–18.

No. 76. $27.00
Feb. 2, 1918.
Order of
Elmer Eckengren. Hills Corbet Co.
Labor on contract for week ending Feb. 2/18.

No. 77. $22.50
Feb. 2, 1918.
Order of
Theo Barth. Hills Corbet Co.
Labor on contract for week ending Feb. 2/18.

No. 78. $39.00
Feb. 2, 1918.
Order of
P. S. Hangen. Hills Corbet Co.
Labor on contract for week ending Feb. 2, 1918.

No. 79. $49.00
Feb. 2, 1918.
Order of
H. J. Gibney. Hills Corbet Co.
Labor on contract for week
ending Feb. 2–18. [203]

No. 80. $27.00
Feb. 2, 1918.
Order of
O. M. Sweatt. Hills Corbet.
Labor on contract for week
ending Feb. 2, 1918.

No. 81. $39.00
Feb. 2, 1918.
Order of Hills Corbet Co.
W. M. Benn.
Labor on contract for week
ending Feb. 2–18.

No. 82. $27.00
Feb. 2, 1918.
Order of
Carl F. Pahl. Hills Corbet Co.
Labor on contract for week
ending Feb. 2/18.

No. 83. $27.00
Feb. 2, 1918.
Order of
Albert McClellan. Hills Corbet.
Labor on contract for week Hills Corbet.
ending Feb. 2/18.

No. 84. $12.00
Feb. 1918.
Order of
John Scott.
Labor on contract for week ending Feb. 2/18.
Hills Corbet.

No. 85. $710.00
Feb. 2, 1918.
Order of
Robert Sather.
For week ending Feb. 2/18.
On contract 195.00.
Not on contract 515.00.
Craig Lbr. Co.

No. 86. $27.00
Feb. 2, 1918.
Order of
W. C. Cloudy.
Labor on contract for week ending Feb. 2, 1918.
Hills Corbet Co.

No. 87. $27.00
Feb. 2, 1918.
Order of
C. L. Cloudy.
Labor on contract for week ending Feb. 2, 1918.
Hills Corbet.

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No. 88. $319.00
Feb. 2, 1918.
Order of
F. A. Cloudy.
Labor on contract month ending Feb. 1, 1918.
Hills Corbet.

No. 89. $30.00
Feb. 5, 1918.
Order of
Wm. T. Royalty.
Time due on logging.
Not on contract.
Craig Lbr. Co.

No. 90. $7.65
Feb. 7, 1918.
Order of
A. Hows.
For 45#.
For Halabot @ 17c.
Craig Lumber Co.
Craig Lbr. Co.

No. 91. $71.
Feb. 7, 1918.
Order of
A. Vincnte.
Cook.
For labor Feb. 1–1918.
Craig Lbr. Co.

No. 92. $39.90
Feb. 7, 1918.
Order of
J. Cartine.
2nd Cook for
to Feb. 1, 1918.
Craig Lumber Co.

No. 93. $49.00
Feb. 9, 1918.
Order of
H. J. Gibney.
Labor on contract for week ending Feb. 9–18.
On contract.
Hills Corbet.

No. 94. $24.00
Feb. 9, 1918.
Order of
John Scott.
Labor on contract for week ending Feb. 9–18.
H. C. Co.
On contract.
Hills Corbet.

No. 95. $9.10
Feb. 9, 1918.
Order of
Mrs. Eliza Smith.
For nails.
H. C. Co.
On contract.
Hills Corbet. [205]

No. 96. $31.00
Feb. 9, 1918.
Order of
Albert McClellan.
Labor on contract for week ending Feb. 9–18.
On contract.
Hills Corbet.
Due on longshoring 7 hrs. (overtime.)

No. 97. $31.00
Feb. 9, 1918.
Order of
O. M. Sweatt.
Labor on contract for week ending Feb. 9–18.
On contract.
Hills Corbet.

No. 98. $39.00
Feb. 9, 1918.
Order of
W. M. Benn.
Labor on contract for week ending Feb. 9, 1918.
H. C. Co.
On contract.
Hills Corbet.

No. 99. $39.00
Feb. 9, 1918.
Order of
P. L. Hangen.
Labor on contract for week ending Feb. 9–18.
On contract.
Hills Corbet.

No. 100. $27.00
Feb. 9, 1918.
Order of
C. L. Cloudy.
Labor on contract for week ending Feb. 9–18, H. C. Co.
On contract.
Hills Corbet.

No. 101. $27.00
Feb. 9, 1918.
Order of
W. C. Cloudy.
Labor on contract for week ending Feb. 9/1918.
On contract.
Hills Corbet.

No. 102. $27.00
Feb. 9, 1918.
Order of
Robert Walker.
Labor on contract for week ending past. Feb. 9–18.
On contract.
Hills Corbet.

No. 103. $27.00
Feb. 9, 1918.
Order of
L. E. Rothstrom.
Labor on contract for week ending Feb. 9.
On contract.
Hills Corbet.

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No. 104. $27.00
Feb. 9, 1918.
Order of
Elmer Eckengren.
Labor on contract for week ending Feb. 9–18. H. C. Co.
On contract.
Hills Corbet.

No. 105. $31.00
Feb. 9, 1918.
Order of
C. F. Pahl.
Labor on contract for week ending Feb. 9, H. C. Co.
On contract.
Hills Corbet.

No. 106. $22.50
Feb. 9, 1918.
Order of
Theo. Barthe.
Labor on contract for week ending Feb. 9–18.
On contract.
Hills Corbet.

No. 107. $36.00
Feb. 9, 1918.
Order of
Robert Sather.
Labor on contract for week ending Feb. 9.
Hill Cor. Co.
On contract.
Hills Corbet.

No. 108. $126.90
Feb. 9, 1918.
Order of
Hills Corbet Co.,
Acct. B. F. Book.
For labor on contract.
Hills Corbet Co.
Bal. to date Nov. 27 to Jan. 7/18.
Craig Lbr. Co.

No. 109. $149.61
Feb. 9, 1918.
Order of
Hills Corbet Co.
Orders #300–301–302–303.
On a/c.

Order #
300—63.76
301—78.76
302— 4.50
303— 2.59
149.61

Craig Lbr. Co.

No. 110. $13.00
Feb. 9, 1918.
Order of
F. Matheson.
nails.
For 2 Kegs #10 Dy.
Hills Corbet Co.
Not on contract.
Hills Corbet.

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No. 111. $425.15
Feb. 9, 1918.
Order of
Al. Brown.
Cook house.
For supplies.
Jan. 1. Feb. 1.
Not on contract.
Craig Lumber.

No. 112. $25.00
Feb. 11, 1918.
Order of
G. W. Matheson.
Labor on contract.
For Hills Corbet Co.
On acct. Feb. 1 to Feb. 28.
On contract.
Hills Corbet.

No. 113. $35.75
Feb. 13, 1918.
Order of
I. Corteno.
Cook.
For Craig Lumber Co.
Not on contract.
Craig Lumber Co.

No. 114. $126.25
Feb. 14, 1918.
Order of
Geo. Hamilton.
Towing sand gravel logs etc.
in full to date.
Not on contract.
Craig Lumber Co.

No. 115. $31.50
Feb. 14, 1918.
Order of
A. D. Snyder.
Acct. sand and gravel in full to date.
Not on contract.
Craig Lbr. Co.

No. 116. $31.50
Feb. 16, 1918.
Order of
Theo Barthe.
Labor on contract For Hills Corbet Co.
Week ending Feb. 16–18.
On contract.
Hills Corbet Co.

No. 117. $39.00
Feb. 16, 1918.
Order of
W. M. Benn.
Labor on contract for week ending Feb. 16–18.
On contract.
Hills Corbet Co.

No. 118. $27.00
Feb. 16, 1918.
Order of
W. C. Cloudy.
Labor on contract for week ending Feb. 16–18.
On contract.
Hills Corbet.
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No. 119. $27.00
Feb. 1918.
Order of
L. G. Rothstrom.
Labor on contract for week ending Feb. 16.
Hills.
On contract.
Hills Corbet.

No. 120. $22.50
Feb. 16, 1918.
Order of
Hary Naylor.
Labor not on contract. Clearing land.
Hills Corbet Co. Not on contract.
Week ending Feb. 16. Hills Corbet.

No. 121. $27.50
Feb. 16, 1918.
Order of
Carl Pahl. On contract.
Labor on contract for week ending Feb. 16–18. Hills Corbet.

No. 122. $27.00
Feb. 16, 1918.
Order of
Robert Sather. On contract.
Labor on contract for week ending Feb. 16. Hills Corbet.
Due 9.00.

No. 123. $9.00
Feb. 16, 1918.
Order of
Robert Sather. Not on contract.
Labor clearing land for. Hills Corbet.
Craig Lbr. Co.
Bal. due on week ending Feb. 16.

No. 124. $30.00
Feb. 16, 1918.
Order of
Robert Sather. On contract.
Labor on contract for week ending Feb. 16. Hills Corbet.

No. 125. $67.70
Feb. 16, 1918.
Order of
F. Matheson.
Not on contract.
Hills Corbet.

Feb. 14.

10	Roll 2 Ply	37.50
2	Kegs 12	13.00
2	" 12	13.00
		63.50
	Nuts	4.20
		67.70

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No. 126. $27.00
Feb. 16, 1918.
Order of
Elmer Eckengren.
Labor on contract for week ending Feb. 16–18.

On contract.
Hills Corbet Co.

No. 127. $49.00
Feb. 16, 1918.
Order of
H. J. Gibney.
Labor on contract for week ending Feb. 16.

On contract.
Hills Corbet Co.

No. 128. $39.00
Feb. 16, 1918.
Order of
P. L. Hangen.
Labor on contract for week ending Feb. 16.

On contract.
Hills Corbet Co.

No. 129. $27.00
Feb. 16, 1918.
Order of
C. L. Cloudy.
Labor on contract for week ending Feb. 16.

On contract.
Hills Corbet Co.

No. 130. $32.00
Feb. 16, 1918.
Order of
O. M. Sweatt.
Labor on contract for week ending Feb. 16.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 131. $90.00
Feb. 16, 1918.
Order of
F. A. Cloudy..
Labor on contract on acct. Feb. time.
On contract.
Hills Corbet Co.

No. 132. $29.25
Feb. 16, 1918.
Order of
John Scott.
Labor on contract for week ending Feb. 16–18.
On contract.
Hills Corbet Co.

No. 133. $27.50
Feb. 16, 1918.
Order of
Alber McClellan.
Labor on contract for week ending Feb. 16.
On contract.
Hills Corbet Co. [210]

No. 134. $2.00
Feb. 18, 1918.
Order of
F. J. Tromble.
Clams Chg. for cook house.
Not on contract.
Hills Corbet.

No. 135. $6.95
Feb. 18, 1918.
Order of
Chas. Fox.
Express typewritter for freight (Teddy.)
Hills Corbet.

Not on contract.
Hills Corbet.

No. 136. $54.00
Feb. 18, 1918.
Order of
A. Vicente.
cook chg. cook.
for house.

Not on contract.
Hills Corbet.

No. 137. $52.87
Feb. 19, 1918.
Order of
Robert Roylaty.
Labor not on contract for.
Bal. due in full on acct.

Not on contract.
Hills Corbet Co.

No. 138. $15.00
Feb. 19, 1918.
Order of
F. A. Cloudy.
Acct. Chas. Spencer.
For cash advances Jan. 4th, 1918.

Not on contract.
Hills Corbet Co.

No. 139. $15.00
Feb. 19, 1918.
Order of
F. A. Cloudy.
Deducted from their checks.
For cash advanced.

Due on check Nov. and Dec. 1917, Cash 5.00. Carl Pahl 3.00
W. C. Cloudy 2.00
C. S. Cloudy 5.00
On contract.
Hills Corbet Co.

No. 140. $6.00
Feb. 21, 1918.
Order of
Robert Roylaty, Not on contract.
Bal. due on time for Not on contract
Hills Corbet Co. Hills Corbet.

No. 141. $53.25
Feb. 23, 1918.
Order of Not on contract.
James Hurly. Bunkhouse for caretaker. Hills Corbet.
Not on contract. [211]

No. 142. $49.00
Feb. 23, 1918.
Order of
H. J. Gibney, On contract.
Labor on contract for week Hills Corbet Co.
ending Feb. 23.

No. 143. $31.50
Feb. 23, 1918.
Order of On contract.
Theo. Barth. Hills Corbet Co.
Labor on contract for week
ending Feb. 23.

No. 144. $31.50
Feb. 23, 1918.
Order of
O. M. Sweatt. On contract.
Labor on contract for week Hills Corbet Co.
ending Feb. 23–18.

No. 145. $31.50
Feb. 23, 1918.
Order of On contract.
L. G. Rothstrom.
Labor on contract for week Hills Corbet Co.
ending Feb. 23.

No. 146. $31.50
Feb. 23, 1918.
Order of
Hary Naylor.
Clearing land not on contract for week ending Feb. 23.
Not on contract.
Hills Corbet.

No. 147. $38.25
Feb. 23, 1918.
Order of
D. Becker.
Labor clearing land for week ending Feb. 23.
Not on contract.
Hills Corbet.

No. 148. $42.00
Feb. 23, 1918.
Order of
Robert Sather.
Labor clearing land for week ending Feb. 23–18.
Not on contract.
Hills Corbet.
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No. 149. $10.40
Feb. 23, 1918.
Order of
A. Vincentie.
Labor acct. cook house for wood not on contract.
Not on contract.
Hills Corbet.

No. 150. $10.00
Feb. 23, 1918.
Order of
F. Gardner.
Flunkey.
Not on contract.
Hills Corbet.

No. 151. $35.00
Feb. 23, 1918.
Order of
Robert Walker.
Labor on contract for week ending Feb. 23.
On contract.
Hills Corbet.

No. 152. $30.37
Feb. 23, 1918.
Order of
C. F. Pahl.
Labor on contract for week ending Feb. 23.
On contract.
Hills Corbet.

No. 153. $31.00
Feb. 23, 1918.
Order of
A. McClellan.
Labor on contract for week ending Feb. 23–18.
On contract.
Hills Corbet.

No. 154. $41.00
Feb. 23, 1918.
Order of
W. M. Benn.
Labor on cont. for week ending Feb. 23.
On contract.
Hills Corbet.

No. 155. $41.00
Feb. 23–18. 1918.
Order of
P. L. Hangen.
Labor on contract for week ending Feb. 23–18.
On contract.
Hills Corbet.

No. 156. $31.50
Feb. 23, 1918.
Order of
Elmer Eckengren.
Labor on contract for week ending Feb. 23–18.
On contract.
Hills Corbet Co.

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No. 157. $29.25
Feb. 23, 1918.
Order of
C. L. Cloudy.
Labor on contract for week ending Feb. 23–18.
On contract.
Hills Corbet Co.

No. 158. $35.50
Feb. 23, 1918.
Order of
W. Cloudy.
Labor on contract for week ending Feb. 23.
Night watch.
On contract.
Hills Corbet.

No. 159. $29.25
Feb. 23, 1918.
Order of
John Scott.
Blk. Smith for week ending Feb. 23–18.
On contract.
Hills Corbet.

No. 160. $48.00
Feb. 23, 1918.
Order of
G. W. Matheson.
Labor on contract for week ending Feb. 23–18.
On contract.
Hills Corbet.

No. 161. $12.36
Feb. 23, 1918.
Order of
Ed Johnson.
Clearing land in full of acct. to date.
Not on contract.
Hills Corbet Co.

No. 162. $84.36
Feb. 23, 1918.
Order of
Mark La Belle.
Clearing land in full to date.
Not on contract.
Hills Corbet Co.

No. 163. $30.36
Feb. 23, 1918.
Order of
H. G. Stevens.
Labor on contract for week ending Feb. 23.
2968,45.
On contract.
Hills Corbet Co.

No. 164. $ 2.00
Feb. 23, 1918.
Order of
Geo. Hamilton.
For towing Bunkhouse from log pound to dock.
Not on contract.
Hills Corbet Co.

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No. 165. $ 2.60
Feb. 27, 1918.
Order of
Miss S. Young.
Exp. acct. for washing.
F. A. C. 1.15 Dunkan 1.45
Hills Corbet Co.
Not on contract.

No. 166. $520.00
Feb. 28, 1918.
Order of
G. W. Matheson.
For labor on sawmill not on contract.
Not on contract.
Hills Corbet Co.

No. 167. $12.50
Mar. 2, 1918. Not on contract.
Order of
L. K. Halversen. Hills Corbet Co.
Tools, lanterns, globes, etc.
Hills Corbet. Chg. their acct.

No. 168. $48.12
Mar. 2, 1918.
Order of
H. J. Gibney. On contract.
For labor on contract.
Hills Corbet Co., week ending Mar. 2/18. Hills Corbet Co.

No. 169. $31.50
Mar. 2, 1918.
Order of On contract.
Theo. Barth. Hills Corbet Co.
For labor on contract week ending Mar. 2–18.

No. 170. $30.92
Mar. 2, 1918.
Order of On contract.
O. M. Sweatt. Hills Corbet Co.
Labor on contract week ending Mar. 2–18.

No. 171. $27.00
Mar. 2, 1918.
Order of
C. F. Pahl. On contract.
Labor on contract week ending Mar. 2–18. Hills Corbet Co.

No. 172. $5.61
Mar. 2, 1918.
Order of
Fred Horn.
For fish Chg to Cook House.
Not on contract.
Hills Corbet Co.

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No. 173. $27.50
Mar. 2, 1918.
Order of
A. McClellan.
Labor on contract for week ending Mar. 2–18.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 174. $43.50
Mar. 2, 1918.
Order of
W. M. Brown.
Labor on contract for week ending Mar. 2–18.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 175. $43.50
Mar. 2, 1918.
Order of
P. L. Hangen.
Labor on contract for week ending Mar. 2–18.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 176. $27.00
Mar. 2, 1918.
Order of
Elmer Eckengren.
Labor on contract for week ending Mar. 2–18.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 177. $30.00
Mar. 2, 1918.
Order of
Robert Walker.
Labor on contract for week ending Mar. 2–18.
On contract.
Hills Corbet Co.

No. 178. $27.00
March 2, 1918.
Order of
C. L. Cloudy.
Labor on contract for week ending Mar. 2–18.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 179. $27.00
March 2, 1918.
Order of
W. C. Cloudy.
Labor on contract for week ending Mar. 2–18.
Hills Corbet Co.
On contract.
Hills Corbet.

No. 180. $22.50
March, 1918.
Order of
L. G. Rothstrom.
Labor on contract for week ending Mar. 2–18.
Hills Corbet Co.
On contract.
Hills Corbet Co.

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No. 181. $27.00
Mar. 2, 1918.
Order of
H. G. Stevens.
Not on contract for week ending March 2–18.
Not on contract.
Hills Corbet Co.

No. 182. $22.50
March 2, 1918.
Order of
John Scott. On contract.
Labor on contract for week ending March 2–18. Hills Corbet Co.
Hills Corbet Co.

No. 183. $80.01
March 2, 1918.
Order of Not on contract.
Wm. Kincaid. Hills Corbet Co.
Cook. Not on contract to date.

No. 184. $23.06
March 2, 1918.
Order of
Dan Becker. Not on contract.
Not on contract for week ending Mar. 2–18. Hills Corbet Co.
Hills Corbet Co.

No. 185. $30.75
March 2, 1918.
Order of
Robert Sather. Not on contract.
Labor on contract for week ending Mar. 2. Hills Corbet Co.
Hills Corbet Co.

No. 186. $14.00
March 2, 1918.
Order of Not on contract.
Archy Young. Hills Corbet Co.
For week ending March, 2–18.

No. 187. $23.75
Mar. 2, 1918.
Order of
A. Vecente.
Chg. bunk houses and cook houses for week ending Mar. 2/18.
Not on contract.
Hills Corbet Co.

No. 188. $25.00
March 2, 1918.
Order of
E. Wright.
Chg. cook house.
Not on contract.
Hills Corbet Co.
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No. 189. $94.00
March 6, 1918.
Order of
E. Wright.
Labor not on contract.
Chg. cook house.
Not on contract.
Hills Corbet Co.

No. 190. $2.53
Mar. 4, 1918.
Order of
Walter Waters.
Launch Glenover.
Freight chge. G. H. Matheson.
Not on contract.
Hills Corbet.

No. 191. $5.00
Mar. 4, 1918.
Order of
St. Michael Trading Co.
For material 12–2″ Elbows.
Hills Corbet Co., not on contract.
Not on contract.
Hills Corbet Co.

No. 192. $16.65
Mar. 4, 1918.
Order of
L. K. Halverson.
Acct. Chas. Spencer as per statement Jan. 14/18.
Hills Corbet Co., not on contract.
Not on contract.
Hills Corbet Co.

No. 193. $7.00
March 4, 1918.
Order of
L. F. Halverson.
Acct. Craig Lbr. Co., for 23 joints stove pipe valley tin.
Not on contract.
Not on contract.
Hills Corbet Co.

No. 194. $12.95
Mar. 4, 1918.
Order of
F. A. Cloudy.
Acct. L. H. Halverson, exp. acct. Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 195. $120.81
March 6, 1918.
Order of
North Pacific Trading and Packing Co.
For material Feb. 25–27–1918.
Hills Corbet Co.
Not on contract.
Not on contract.
Hills Corbet Co.

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No. 196. $295.05
March 6, 1918.
Order of
F. A. Cloudy.
Labor on contract in full to date March 1–18.

On contract in full to March 1–18.
Hills Corbet Co.

No. 197. $27.00
March 9, 1918.
Order of
Dan Becker.
Labor not on contract chg. Bunk House.
Hills Corbet Co., week ending Mar. 9.

Not on contract.
Hills Corbet Co.

No. 198. $36.00
March 9, 1918.
Order of
Robert Sather.
Chg. Bunk houses not on contract week ending Mar. 9.

Not on contract.
Hills Corbet Co.

No. 199. $24.75
March 9, 1918.
Order of
A. Vicente.
Chg. bunk houses and cook houses not on contract week ending Mar. 9–18.

Not on contract.
Hills Corbet Co.

No. 200. $17.50
March 9, 1918.
Order of
Ed. Wright.
Flunkey.
For week ending Mar. 9.
Not on contract.

Not on contract.
Hills Corbet Co.

No. 201. $14.00
March 9, 1918.
Order of
Archie Young.
Chg. cook house.
For week ending Mar. 9–18.
Not on contract.
Not on contract.
Hills Corbet Co.

No. 202. $29.25
March 9, 1918.
Order of
Herman West.
Chg. bunk house week ending Mar. 9–18.
Not on contract.
Not on contract.
Hills Corbet Co.

No. 203. $27.00
March 9, 1918.
Order of
Mark La Belle.
Chg. bunk house for week ending Mar. 9–18.
Hold on acct. $28.08 fare to Craig.
Not on contract.
Hills Corbet Co.

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No. 204. $49.87
March 9, 1918.
Order of
H. J. Gibney.
Labor on contract for week ending Mach. 9–18.
On contract.
Hills Corbet Co.

No. 205. $31.50
March 9, 1918.
Order of
Theo. Barth.
Labor on contract for week ending Mach. 9–18.
On contract.
Hills Corbet Co.

No. 206. $32.06
March 9, 1918.
Order of
O. M. Sweatt.
Labor on contract for week ending March 9–18.
On contract.
Hills Corbet Co.

No. 207. $27.00
Mach. 9, 1918.
Order of
C. F. Pahl.
Labor on contract for week ending Mach. 9–18.
On contract.
Hills Corbet Co.

No. 208. $29.25
Mach. 9, 1918.
Order of
Al MacClellan.
Labor on contract for week ending March 9–18.
On contract.
Hills Corbet Co.

No. 209. $39.00
Mach. 9, 1918.
Order of
W. M. Benn.
Labor on contract for week ending Mar. 9–18.
On contract.
Hills Corbet Co.

No. 210. $39.00
Mach. 9, 1918.
Order of
P. S. Hangen.
Labor on contract for week ending Mach. 9–18.
On contract.
Hills Corbet Co.

No. 211. $27.00
Mach. 9, 1918.
Order of
Emer Eckengren.
Labor on contract for week ending Mach. 9–18.
On contract.
Hills Corbet Co.

No. 212. $30.00
March, 1918.
Order of
Robert Walker.
Labor on contract week ending March 9–18.
On contract.
Hills Corbet Co.

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No. 213. $27.00
March, 1918.
Order of
C. L. Cloudy.
Labor not on contract for week ending March 9–18.
On contract.
Hills Corbet.

No. 214. $44.00
March, 1918.
Order of
Gill Matheson.
Labor on contract for week ending March 9–18.
(out)
Not on contract.
Hills Corbet Co.

No. 215. $27.00
Mach. 9, 1918.
Order of
W. C. Cloudy.
Labor on contract for week ending March 9–18.
On contract.
Hills Corbet Co.

No. 216. $27.00
March 8, 1918.
Order of
H. G. Stevens.
Labor on contract for week ending Mar. 9–18.
Not on contract.
Hills Corbet Co.

No. 217. $27.00
March 9, 1918.
Order of
John Scott.
Labor on contract for week ending Mar. 9–18.
On contract.
Hills Corbet Co.

No. 218. $27.00
Mach. 9, 1918.
Order of
L. G. Rothstrom.
Labor on contract for week ending Mach. 9–18.
On contract.
Hills Corbet Co.

No. 219. $2.00
March, 1918.
Order of
Chas. Spencer.
For clams chg. cook house.
Not on contract.
Hills Corbet Co.

No. 220. $18.00
Mach. 14, 1918.
Order of
L. G. Rothstrom.
Labor on acct. contract for week ending on date.
On contract.
Hills Corbet Co.

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No. 221. $10.00
Mach. 14, 1918.
Order of
F. A. Cloudy.
Labor on contract on acct.
March.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 222. $49.00
March 16, 1918.
Order of
H. J. Gibney.
Labor on contract for week
ending Mar. 16.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 223. $31.50
Mach. 16, 1918.
Order of
Theo. Barth.
Labor on contract for week
ending Mar. 16–18.
Hills Corbet Co.,
On contract.
Hills Corbet Co.

No. 224. $31.50
March 16, 1918.
Order of
O. M. Sweatt.
Labor on contract for week
ending Mar. 16–18.
Hills Corbet Co.,
On contract.
Hills Corbet Co.

No. 225. $31.50
March 16, 1918.
Order of
C. F. Pahl.
Labor on contract for week
ending Mar. 16–18.
Hills Corbet Co.,
On contract.
Hills Corbet Co.

No. 226. **$27.00**
March 16, 1918.
Order of
Al MacClellan.
Labor on contract for week
ending March 16–18.
Hills Corbet Co.,
On contract.
Hills Corbet Co.

No. 227. $39.00
March 16, 1918.
Order of
W. M. Benn.
Labor on contract for week
ending Mar. 16–18.
Hills Corbet Co.,
On contract.
Hills Corbet Co.

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No. 228. $39.00
March 16, 1918.
Order of
P. L. Hangen.
Labor on contract for week
ending Mar. 16–18.
Hills Corbet Co.,
On contract.
Hills Corbet Co.

No. 229. $31.50
March 16, 1918.
Order of
C. L. Cloudy.
Labor on contract for week
ending Mar. 16–18.
Hills Corbet Co.,
On contract.
Hills Corbet Co.

No. 230. $30.50
March 16, 1918.
Order of
Robert Walker.
Labor on contract for bal. to
date in full.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 231. $27.00
March 16, 1918.
Order of
W. C. Cloudy.
Labor on contract for week ending Mar. 16–18.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 232. $27.00
March 16, 1918.
Order of
H. J. Stevens.
Not on contract for week ending Mar. 16–18.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

No. 233. $27.00
March 16, 1918.
Order of
John Scott.
Labor on contract for week ending Mar. 16–18.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 234. $22.50
March 16, 1918.
Order of
Mark La Belle.
Labor chg. Bunk Houses for week ending March 16.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

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No. 235. $80.00
March 16, 1918.
Order of
W. M. Kincaid.
Cook to date Mar. 16.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

No. 236. $15.75
March 16, 1918.
Order of
Harry Naylor.
Labor chg. Bunk houses
week ending Mar. 16.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

No. 237. $24.75
March 16, 1918.
Order of
Dan Becker.
Chg. Bunk houses.
for week ending Mar. 16–18.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

No. 238. $36.00
March 16, 1918.
Order of
Robert Sather.
Chg. Bunk houses
for week ending Mar. 16–18.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

No. 239. $15.75
March 16, 1918.
Order of
A. Vincente.
Chg. cook house and Bunk-
houses week ending Mar.
16–18.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

No. 240. $17.50
March 16, 1918.
Order of
Edward Wright.
Chg. Cook House for
week ending Mar. 16–18.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

No. 241. $14.00
March 16, 1918.
Order of
Archie Young.
Chg. Cook House for
week ending Mar. 16–18.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

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No. 242. $27.00
March 16, 1918.
Order of
Herman West.
Chg. bunk houses for
week ending Mar. 16–18.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

No. 243. $25.00
March 16, 1918.
Order of
Geo. Hudelton.
Trip to Selzer for acct.
Harry Naylor, see
F. Dunkan.
Not on contract.
Hills Corbet Co.

No. 244. $27.00
March 16, 1918.
Order of
Elmer Eckengren.
Labor on contract for week
ending March 16.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 245. $31.50
March 16, 1918.
Order of
Mark LaBelle.
Chg. Bunk houses for
week ending Mar. 23
H. C. Co.
Not on contract.
Hills Corbet Co.

No. 246. $35.00
March 23, 1918.
Order of
W. M. Kincaid.
Cook.
For week ending 3/23.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

No. 247. $21.00
March 23, 1918.
Order of
Dan Becker.
Chg. Bunk house.
For week ending 3/23.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

No. 248. $36.00
March 23, 1918.
Order of
Robert Sather.
Chg. Bunk house.
For week ending 3/23.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

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No. 249. $28.00
March 23, 1918.
Order of
A. Vincente.
Chg. Bunk and Cook house.
Week ending 3/23.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

No. 250. $17.50
March 23, 1918.
Order of
Edward Wright.
Chg. cook house.
For week ending 3/23.
Hills Corbet Co.
Flunkey.
Not on contract.
Hills Corbet Co.

No. 251. $8.00
March 23, 1918.
Order of
Francis Cloudy. Not on contract.
Flunkey. Hills Corbet Co.
For week ending 3/23.
Hills Corbet Co.

No. 252. $27.00
March 23, 1918.
Order of Not on contract.
Herman West. Hills Corbet Co.
Chg. Bunk House.
For week ending Mar. 23.

No. 253. $49.00
March 23, 1918.
Order of On contract.
H. J. Gibney. Hills Corbet Co.
Labor on contract for week ending 3/23.
Hills Corbet Co.

No. 254. $21.00
March 23, 1918.
Order of On contract.
Theo. Barth. Hills Corbet Co.
Labor on contract for week ending Mar. 23.
Hills Corbet Co.

No. 255. $31.50
March 23, 1918.
Order of On contract.
O. M. Sweatt. Hills Corbet Co.
Labor on contract for week ending 3/23.
Hills Corbet Co.

No. 256. $31.50
March 23, 1918.
Order of
Carl Pahl.
Labor on contract for week ending 3/23.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 257. $31.50
March 23, 1918.
Order of
Al. McClellan.
Labor on contract for week ending Mar. 23–18.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 258. $39.00
March 23, 1918.
Order of
W. M. Benn.
Labor on contract for week ending Mar. 23.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 259. $39.00
March 23, 1918.
Order of
P. S. Hangen.
Labor on contract for week ending Mar. 23/18.
On contract.
Hills Corbet Co.

No. 260. $31.50
March 23, 1918.
Order of
Elmer Eckengren.
Labor on contract for week ending Mar. 23.
On contract.
Hills Corbet.

No. 261. $31.50
March 23, 1918.
Order of
Chas. Cloudy.
Labor on contract for week ending Mar. 23.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 262. $48.00
March 23, 1918.
Order of
Gill Matheson.
Labor on contract for week ending Mar. 23.
Hills Corbet Co.
(out)
Not on contract.
Hills Corbet Co.

No. 263. $24.75
March 23, 1918.
Order of
G. H. Stevens.
Labor not on contract for week ending March 23.
Hills Corbet Co.
Not on contract.
Hills Corbet Co.

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No. 264. $27.00
March 23, 1918.
Order of
John Scott.
Labor on contract for week ending Mar. 23.
Hills Corbet Co.
On contract.
Hills Corbet Co.

No. 265. $2.40
March 25, 1918.
Order of
Marion Covsier.
Chg. Cook house for laundry.
Not on contract.
Hills Corbet Co.

No. 267. $5.00
March 25, 1918.
Order of
Theo. Barthe.
In full of acct for labor on contract. Bal. due on week ending Mar. 23.

On contract.
Hills Corbet Co.

No. 268. $29.50
March 25, 1918.
Order of
W. M. Benn.
Bal. on labor 6.50 3/24.
For tools $23.00.
Hills Corbet Co.

Charge H. C. Co. $16.00
$6.50 on contract
Gill Matheson 7.00

No. 269. $19.25
March 25, 1918.
Order of
P. L. Hangen.
Bal. for labor on contract and tools.

Charge Hills Corbet 5.00
Gill Matheson 7.75
6.50 on contract.

No. 270. $14.00
March 25, 1918.
Order of
H. J. Gibney.
Labor on contract for Bal. in full to date Mar. 23 to Mar. 25 2 das.

No. 271. $20.00
March 26, 1918.
Order of
The City Store Wrangell Alaska for 10 Rolls 2 ply paper.

Not on contract.
Hills Corbet Co.

No. 272. $2.60
March 26, 1918.
Order of
Launch Gleuna.
Freight on 10 rolls of 2 ply roofing paper from The City Store Wrangell Alaska.
Not on contract.
Hills Corbet Co.

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No. 273. $19.90
March 26, 1918.
Order of
F. Matheson.
Wrangell.
Chg. F. A. Cloudy.
Personal.
Hills Corbet Co.
Not on contract.
Chg. F. A. Cloudy.

No. 274. $37.77
March 26, 1918.
Order of
W. P. and P. Co. Klawack.
For supplies chg. F. A. C. F. D. and H. C. Co.
Not on contract.
Hills Corbet Co.

No. 275. $22.74
March 30, 1918.
Order of
Mark La Belle.
Labor chg. bunk houses for week ending March 30 less 6.50 fare Wrangell to Craig.

Labor	29.24
	6.50
	22.74

Not on contract.
Hills Corbet Co.

No. 276. $ .50
March 30, 1918.
Order of
Wm. Kincaid.
Cook.
For week ending March 30
less 34.50 fare from Seattle
to Craig via Wrangell.

Labor 35.00
fare 34.50
.50

Not on contract.
Hills Corbet Co.

No. 277. $27.00
March 30, 1918.
Order of
Dan Becker.
Blk. smith $4.50.
For week ending Mar. 30.
Bunk houses $22.50.

Not on contract.
Hills Corbet Co.

No. 278. $39.25
March 30, 1918.
Order of
Robert Sather.
Labor chg. bunk houses for
week ending Mar. 30.

Not on contract.
Hills Corbet Co.

No. 279. $27.00
March 30, 1918.
Order of
A. Vicente.
Labor not on contract for
week ending Mar. 30, chg
cook, bunk houses, wood
cutting.

Not on contract.
Hills Corbet Co.

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No. 280. $17.50
March 30, 1918.
Order of
Edward Wright.
Flunkey.
Chg. cook house for week ending Mar. 30.
Not on contract.
Hills Corbet Co.

No. 281. $27.00
March 30, 1918.
Order of
Herman West.
Labor chg. bunk houses.
For week ending Mar. 30.
Not on contract.
Not on contract.
Hills Corbet Co.

No. 282. $14.00
March 30, 1918.
Order of
Francis Cloudy.
2nd Flunkey.
For week ending Mar. 30.
Not on contract
Hills Corbet Co

No. 283. $15.75
March 30, 1918.
Order of
W. Burns.
Chg. bung houses.
For week ending Mar. 30.
(logger).
Not on contract
Hills Corbet Co

No. 284. $15.75
March 30, 1918.
Order of
Robert Hall.
Chg. bunk houses, etc.
For week ending Mar. 30.
Not on contract.
Hills Corbet Co.

No. 285. $19.12
March 30, 1918. Not on contract.
Order of Hills Corbet Co.
Wm. Matson.
Chg. bunk houses.
For week ending Mar. 30.

No. 286. $19.12
March 30, 1918.
Order of Not on contract.
S. G. Erens. Hills Corbet Co.
Chg. bunk houses,
For week ending Mar. 30.

No. 287. $6.25
March 30, 1918.
Order of Not on contract.
P. Shanhan. Hills Corbet Co.
Labor not on contract.
For week ending Mar. 30. [230]

No. 288. $34.34
March 30, 1918.
Order of On contract.
O. M. Sweatt. Hills Corbet Co.
Labor on contract for week
ending Mar. 30.

No. 289. $29.84
March 30, 1918.
Order of On contract.
Carl F. Pahl. Hills Corbet.
Labor on contract for week
ending Mar. 30.

No. 290. $33.59
March 30, 1918.
Order of
Al. McClellan.
Labor on contract for week ending Mar. 30.

On contract.
Hills Corbet Co.

No. 291. $22.50
March 30, 1918.
Order of
Chas. Cloudy.
Labor on contract for week ending Mar. 30.

On contract.
Hills Corbet Co.

No. 292. $20.00
March 30, 1918.
Order of
C. W. Matheson.
Labor on contract for week ending Mar. 30.

Not on contract.
Hills Corbet Co.

Benn	7.00
Freight	2.53
Hangen	7.75
Check	20.00
	37.28
Labor	48.00
Cr. his acct.	10.72

No. 293. $26.70
Mar. 30, 1918.
Order of
H. G. Stevens.
Labor not on contract for week ending Mar. 30.

To meat 30c
$27.00
.30
26.70

Not on contract.
Hills Corbet Co.

No. 294. $27.00
March 30, 1918.
Order of
M. O. Johnson.
Labor on contract for week ending Mar. 30.

On contract.
Hills Corbet Co.

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No. 295. $42.00
March 30, 1918.
Order of
Frank Waterbury.
Labor on contract for week ending Mar. 30.

On contract.
Hills Corbet Co.

No. 296. $30.00
March 30, 1918.
Order of
Frank Goodrich.
Labor on contract for week ending Mar. 30.

On contract.
Hills Corbet Co.

No. 297. $9.00
March 30, 1918.
Order of
D. Woodhurst.
Labor on contract for week ending Mar. 30.

On contract.
Hills Corbet Co.

No. 298. $9.00
March 30, 1918.
Order of
Chas. Treman.
Labor on contract for week ending Mar. 30.

On contract.
Hills Corbet Co.

No. 299. $320.00
March 30, 1918.
Order of
F. A. Cloudy.
Labor on contract for month ending Mar. 30.

Labor	330.00
Check on account	10.00
	320.00

Expense Craig to Wrangell and return 10.00

On contract.
Hills Corbet Co.

No. 300. $27.00
March 30, 1918.
Order of
Mark La Belle.
Labor not on contract for week ending Mar. 2nd.
Back pay due Mar. 2nd.
Chg. clearing land.

Not on contract.
Hills Corbet Co.

No. 301. $4.50
Apr. 1, 1918.
Order of
Carl F. Pahl.
Labor on contract for week ending Apr. 1 in full to date.

On contract.
Hills Corbet Co.

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No. 302. $27.00
March 4, 1918.
Order of
Geo. Hamilton.
For towing, etc.
H. C. Co.

Not on contract.

No. 303. $58.20
Apr. 4, 1918.
Order of
William Mattson.
Labor on contract.
Bal. in full Mar. 30 to Apr. 12th.

Time	61.70	On contract.
Board	3.50	Hills Corbet Co.
Bal.	58.20	

No. 304. $9.25
Apr. 16, 1918.
Order of
A. Vicente.
Labor not on contract (advance).
Chg. cook and bunk houses.

Not on contract.
Hills Corbet.

No. 305.	$133.00	Due for wages	105.00
Apr. 16, 1918.		Fare refund	28.00
Order of			
William Kincaid.		Double chg.	133.00
Cook.		settled Mar. 2.	
For Bal. to date Not on contract.		Not on contract. Hills Corbet Co.	
No. 306.	$5.00		
Apr. 17, 1918.			
Order of		Not on contract.	
Reuben Yeltatzie.		Chg. Hills Corbet Co.	
Freight charges on connecting rod for engine.			
Chg. H. C. Co.			
No. 307.	$25.00		
Apr. 17, 1918.			
Order of		On contract.	
O. M. Sweatt.		Hills Corbet Co.	
(Advance) Labor on contract Apr. time.			
Hills Corbet Co.			
No. 308.	$50.00		
Apr. 26th, 1918.		out standing.	
Order of		Not on contract.	
G. W. Matheson.		Hills Corbet Co.	
On acct. for labor not on contract.			
Hills Corbet Co.			
No. 309.	$25.00		
Apr. 29, 1918.			
Order of		On contract.	
Fred Gardner.		Hills Corbet Co.	

Labor on contract (on acct.) [233]

No. 310. $150.00
Apr. 29, 1918.
Order of
Robert Sather.
Labor not contract.
For logging.
Not on contract.
Hills Corbet Co.

No. 311. $145.75
Apr. 30, 1918.
Order of
S. G. Evens.
Labor not on contract in full to date Apr. 1 to Apr. 30.
Not on contract.
Hills Corbet Co.

No. 312. $144.00
May 1, 1918.
Order of
W. Barnes.
Acct. labor March and Apr. (on acct.) not on contract.
Not on contract.
Hills Corbet Co.

No. 313. $143.18
May 3, 1918.
Order of
O. M. Sweatt.
Acct. labor for April.
Wages in full on contract $25 received on acct.
On contract.
Hills Corbet Co.

No. 314. $172.68
May 3, 1918.
Order of
Albert McClellan.
Acct. labor on contract.
Wages in full for April on contract.
On contract.
Hills Corbet.

No. 315. $289.00
May 3, 1918.
Order of
Gill Matheson.
Acct labor on contract.
Wages in full for April on contract.

On contract.
Not on contract.

No. 316. $179.42
May 3, 1918.
Order of
M. O. Johnson.
Wages in full for April on contract.

Hills Corbet.
On contract.

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No. 317. $279.12
May 3, 1918.
Order of
Frank Waterbury.
Wages in full for April on contract.

Hills Corbet.
On contract.

No. 318. $179.42
May 3, 1918.
Order of
Frank Goodrich.
Wages in full for April on contract.

Hills Corbet.
On contract.

No. 319. $175.50
May 3, 1918.
Order of
Chas. Cloudy.
Wages in full for April on contract.

Hills Corbet.
On contract.

No. 320. $161.42
May 3, 1918.
Order of Hills Corbet.
Dan Becker. On contract.
Labor on contract for April
in full on contract.

No. 321. $128.00
May 3, 1918.
Order of Hills Corbet.
W. C. Cloudy. On contract.
Labor for April in full on
contract.

No. 322. $155.80
May 3, 1918.
Order of Hills Corbet.
H. G. Stevens. Not on contract.
Labor on contract for April On contract.
wages in full.

No. 323. $54.30
May 3, 1918.
Order of Hills Corbet.
Fred Gardner. On contract.
Acct. labor.
For wages for April in full
on contract.
$25.00 received on acct.

No. 324. $82.68
May 3, 1918.
Order of Hills Corbet.
E. Hill. On contract.
Labor on contract wages in
full for April. [235]

No. 325. $82.68
May 3, 1918.
Order of
Chris Huff.
For labor on contract wages
in full.
Hills Corbet.
On contract.

No. 326. $156.94
May 3, 1918.
Order of
Mark La Belle.
For wages for April in full.
Hills Corbet.
Not on contract.

No. 327. $195.00
May 3, 1918.
Order of
Robt. Sather.
For wages in full for April.
Not on contract.
Hills Corbet.
Not on contract.

No. 328. $123.00
May 3, 1918.
Order of
A. Vicente.
For wages in full for April.
Not on contract.
$9.75 receiver on acct.
Not on contract.

H. C.

No. 329. $110.00
May 3, 1918.
Order of
Edward Wright.
For wages in full for April.
Not on contract.
Hills Corbet.
Not on contract.

No. 330. $160.86
May 3, 1918. Hills Corbet.
Order of Not on contract.
Herman West.
For wages in full for April.
Not on contract.

No. 331. $24.00
May 3, 1918.
Order of Hills Corbet.
Francis Cloudy. Not on contract.
Flunkey. Cook house.
For wages in full for April.
Not on contract.

No. 332. $22.50
May 3, 1918.
Order of Hills Corbet.
W. Burns. Not on contract.
For wages in full in April.
Not on contract.
Advance $144. [236]

No. 333. $166.50
May 3, 1918.
Order of Hills Corbet.
Robt. Hall. Not on contract.
For wages in full for April.
Not on contract.

No. 334. $118.68
May 3, 1918.
Order of Hills Corbet.
Carl Wick. Not on contract.
For wages in full for April.
Not on contract.

No. 334. $40.00
May 3, 1918.
Order of
Chas. Spencer.
On acct. for wages in full for April.
Not on contract.
Hills Corbet.
Not on contract.

No. 335. $25.00
May 3, 1918.
Order of
Chas. Spencer.
For wages for April in full
Not on contract.
5.00 advanced from cook house receipt.
Hills Corbet.
Not on contract.

No. 336. $40.20
May 3, 1918.
Order of
R. M. Phillips.
For wages in full for April.
Not on contract.
Board $15.00.
Hills Corbet.
Not on contract.

No. 337. $42.40
May 3, 1918.
Order of
G. A. Young.
For wages in full for April.
Not on contract.
Board $10.00.
Hills Corbet.
Not on contract.

No. 338. $9.60
May 3, 1918.
Order of
Geo. R. Wall.
For wages in full for April.
Not on contract.
Board 6.00.
Hills Corbet.
Not on contract.

No. 339. $9.60
May 3, 1918.
Order of Hills Corbet.
Antone Schuller. Not on contract.
For wages in full for April.
Not on contract.
Board 6.00.

No. 340. $10.20
May 3, 1918.
Order of Hills Corbet.
Thomas Carlson. Not on contract.
For wages in full for April.
Not on contract.
Board 6.00.

No. 341. $17.80
May 3, 1918.
Order of Hills Corbet.
Elmer Prescott. Not on contract.
For wages in full for April.
Not on contract.

No. 342. $12.90
May 3, 1918.
Order of Hills Corbet.
Roy Whitman. Not on contract.
For wages in full for April.
6.00 board.

No. 343. $9.60
May 3, 1918.
Order of Hills Corbet.
Wm. Cochran. Not on contract.
For wages for April in full.
Not on contract.
3.00 board.

No. 345. $9.60
May 3, 1918.
Order of
Chas. Treman. Hills Corbet.
For wages in full for April. Not on contract.
Not on contract.
3.00 board.

No. 346. $9.60
May 3, 1918.
Order of
Olaf Robertson.
For wages in full for April.
Not on contract.
3.00 board.

Hills Corbet.
Not on contract.

No. 347. $9.60
May 3, 1918.
Order of
Thomas Wall.
For wages in full for April.
Not on contract.
3.00 board.

Hills Corbet.
Not on contract.

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No. 348. $85.00
May 3, 1918.
Order of
Wm. Kincaid.
For wages in full for April.
Not on contract.

Hills Corbet.
Not on contract.

No. 349. $438.62
May 3, 1918.
Order of
F. A. Cloudy.
For wages in full for April.
On contract.

Hills Corbet.
On contract.

No. 350. $10.72
May 4, 1918.
Order of
G. W. Mathson.
See Ck. No. 292.
Payed in full.
Not on contract.

Hills Corbet.
Not on contract.

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And thereupon the trustee by his counsel prayed the Court in writing to make the following findings of fact and conclusions of law, to wit:

I.

The contract, a copy of which is attached to the petition of the Hills-Corbet Co. herein, was made between the Craig Lumber Co. and the Hills-Corbet Co., a copartnership, on the 31st of October, 1917.

II.

At the time of the making of the contract the Hills-Corbet Co. had none of the machinery and material they were to furnish under the contract except one engine worth about $800.00, and it was contemplated by both parties that they should buy such machinery and material on the open market and ship to Craig, Alaska.

III.

Hills-Corbet did so purchase the machinery and material as required to fill the contract; the first shipment was made about November 15th, 1917. About the same time they also sent a force of men to Craig under F. A. Cloudy to put and remodel the mill buildings, and do the work of installation of machinery called for in the contract. Fifty per cent of this shipment was paid in cash by the Craig Lumber Company, as called for in the contract.

IV.

Upon reaching Craig with the laborers provided to do the work, or shortly thereafter, Hills-Corbet Co. was paid $10,500.00 in three checks by the Craig Lumber Co., the proceeds of which were de-

posited in the Bank of Wrangell to the credit of their agent F. A. Cloudy to be used in paying the wages of the employees of Hills-Corbet Co. But no arrangements were made by Hills-Corbet Co. for boarding their men, and such board was furnished by the Craig Lumber Co. at a cost to it of at least $1.50 per day per man. [240]

V.

The second shipment of material was made November 27th, 1917. When this shipment reached Craig, Alaska, and was unloaded on the dock, the dock gave way from the weight and a part of the shipment of between $2,000.00 and $3,000.00 in value was lost. This was at once reordered and paid for in full by the Craig Lumber Company, no question being raised as to whose goods they were, and who was to stand the loss. Fifty per cent of this shipment, in addition to the goods lost and paid for in full was also paid by the Craig Lumber Co. in accordance with the terms of the contract.

VI.

Other shipments were made from time to time, the last made being in April 1918, but payments thereafter seem to have been made by the Craig Lumber Co. in gross sums as money was available, without reference to the terms of payment of fifty per cent on invoices as provided in the contract.

VII.

In the meantime, beginning on January 23d, 1918, and ending May 29th, 1918, the Craig Lumber Company ordered from time to time of Hills-Cor-

bet Co. other machinery and goods, not mentioned or included in the contract. Such goods and machinery Hills-Corbet purchased on the market to fill the orders, and charged the Craig Lumber Company the same commission or profit they were to have for goods and machinery purchased under the contract—that is, the cost price plus fifteen per cent, plus ten per cent. These goods were denominated "Extra" in the petitioner's bill of particulars and aggregated $4,436.62, including the commission or profit. The total cost of machinery and material, including commission or profit, shipped under the contract aggregated $32,309.62. All of the goods, however, were charged by Hills-Corbet Co. to the Craig Lumber Company on an open account, and all moneys paid were credited on the same account, whether bought or paid under the contract or otherwise. The segregation shown on the bill of particulars was made for the purpose of this proceeding, and do not appear on the Hills-Corbet Company's books. [241]

VIII.

As under the contract the total cost to the Craig Lumber Company of the work and labor done and material furnished was to be limited to $32,125.00, the total charge against the Craig Lumber Company in the said contract with the Hills-Corbet Co. should be $36,746.26.

IX.

The Craig Lumber Co. paid the Hills-Corbet Co. on the said account as follows:

$19,943.82, for which credit is given on the bill of

particulars; three checks of $3,500.00 each, $10,500.00, making a total of $30,443.82. But it appears from the evidence of E. A. Cloudy that $519.12 of the $10,500.00 furnished him was used in paying employees of the Craig Lumber Company and not employees of the Hills-Corbet Co. The net amount of cash paid on the account is $29,924.70. The Craig Lumber Co., however, paid out for board of the employees of the Hills-Corbet Co. while working on the contract the sum of $3,324.00; and the total credits on the account to which the Craig Lumber Co. is entitled is $33,248.70, and the amount which is owing to the Hills-Corbet Co. on the whole account is $3,497.56.

X.

Although the contract of October 31st, 1917, was breached as to its terms by both parties thereto, during performance of its terms, and especially by the Craig LumberCompany in not making its payments as they came due, the Hills-Corbet Company never attempted to reclaim possession, or asserted a right to reclaim possession of the machinery or equipment they furnished until after the bankruptcy proceedings were begun. [242]

From the above and foregoing facts the Court concludes as matter of law:

I.

The contract of October 31st, 1917, is not a contract of conditional sale, but a contract to build and equip a sawmill; and when Hills-Corbet Co. purchased the machinery, etc., to fill said contract they bought it for the Craig Lumber Co. and it thereupon became the

property of the Craig Lumber Co.

II.

But if the said machinery, equipment, etc., was ever the property of the Hills-Corbet Co., then by the terms of the contract, as construed by the parties in the course of their dealings, the sale was complete, and the title passed, and the reservation of title or attempted reservation of title in the contract is merely a security in the nature of an equitable mortgage.

III.

As the sums due from the Craig Lumber Co. to the Hills-Corbet Co. for the purchase of machinery and material were the earliest payable under the contract, the payments made should be first applied to these, and as the amounts paid exceed the cost of such material, machinery, etc., the property sought to be reclaimed is paid for.

IV.

In any view of the facts and the law, the Hills-Corbet Co. are not the owners of the property they have petitioned to have the trustee deliver to them, and their petition should be denied with costs.

But the Court refused to make said requested findings and conclusions, and exceptions thereto are allowed.

And because the above and foregoing matters do not appear of record, I, Robert W. Jennings, the Judge before whom said cause was tried, do hereby approve and allow the foregoing bill of exceptions, and order the same filed and made a part of the record herein.

Dated this the 20th day of July, 1920.

(Signed) ROBERT W. JENNINGS,
Judge. [243]

In the District Court for Alaska, Division Number One, at Juneau.

No. 31—IN BANKRUPTCY.

#1964—A.

In the Matter of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

HILLS-CORBET CO., a Copartnership, Composed of F. R. HILLS and W. W. CORBET,

vs.

E. L. COBB, as Trustee of the CRAIG LUMBER CO., a Corporation,

Bankrupt.

Assignments of Error.

Now comes E. L. Cobb, as trustee of the Craig Lumber Co., a corporation, bankrupt, and the Bank of Alaska, a corporation, and assigns the following errors committed by the Court during the trial and in the rendition of the judgment and decree in the above-entitled matter, and upon which they will rely in the Appellate Court:

I.

The Court erred in reversing the ruling of the referee, sustaining the demurrer to the petition of appellees and in overruling said demurrer.

II.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

The contract, a copy of which is attached to the petition of the Hills-Corbet Co. herein, was made between the Craig Lumber Co. and the Hills-Corbet Co., a copartnership, on the 31st of October, 1917.

III.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

At the time of the making of the contract the Hills-Corbet Co. had none of the machinery and material they were to furnish under the contract, except one engine worth about $800.00, and it [244] was contemplated by both parties that they should buy such machinery and material on the open market and ship to Craig, Alaska.

IV.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Hills-Corbet Co. did so purchase the machinery and material, as required to fill the contract; the first shipment was made about November 15th, 1917. About the same time they also sent a force of men to Craig under F. A. Cloudy to put and remodel the mill buildings, and do the work of installation of machinery called for in the contract. Fifty per cent of this shipment was paid in cash by the Craig Lumber Company, as called for in the contract.

V.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Upon reaching Craig with the laborers provided to do the work, or shortly thereafter, Hills-Corbet Co. was paid $10,500.00 in three checks by the Craig Lumber Co., the proceeds of which were deposited in the Bank of Alaska to the credit of their agent F. A. Cloudy to be used in paying the wages of the employees of Hills-Corbet Co. But no arrangements were made by Hills-Corbet Co. for boarding their men, and such board was furnished by the Craig Lumber Co. at a cost to it of at least $1.50 per day per man.

VI.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

The second shipment of material was made November 27th, 1917. When this shipment reached Craig, Alaska, and was unloaded on the dock, the dock gave way from the weight and a part of the shipment of between $2,000.00 and $3,000.00 in value was lost. This was at once reordered and paid for in full by the Craig Lumber [245] Company, no question being raised as to whose goods they were, and who were to stand the loss. Fifty per cent of this shipment, in addition to the goods lost and paid for in full was also paid by the Craig Lumber Co. in accordance with the terms of the contract.

VII.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Other shipments were made from time to time, the last made being in April, 1918, but payments thereafter seem to have been made by the Craig Lumber

Co. in gross sums as money was available, without reference to the terms of payment of fifty per cent on invoices as provided in the contract.

VIII.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

In the meantime, beginning on January 23d, 1918, and ending May 29th, 1918, the Craig Lumber Company ordered from time to time of Hills-Corbet Co. other machinery and goods, not mentioned or included in the contract. Such goods and machinery Hills-Corbet Co. purchased on the market to fill the orders, and charged the Craig Lumber Company the same commission or profit they were to have for goods and machinery purchased under the contract—that is, the cost price plus fifteen per cent, plus ten per cent. These goods were denominated "Extra" in the petitioners' bill of particulars and aggregated $4,436.62, including the commission or profit. The total cost of machinery and material, including commission or profit, shipped under the contract aggregated $32,309.62. All of the goods, however, were charged by Hills-Corbet Co. to the Craig Lumber Company on an open account, and all moneys paid were credited on the same account, whether bought or paid under the contract or otherwise. The segregation shown on the bill of particulars was made for the purpose of this proceeding, and do not appear on the Hills-Corbet Company's books. [246]

IX.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

As under the contract the total cost to the Craig Lumber Company of the work and labor done and material furnished was to be limited to $32,125.00, the total charge against the Craig Lumber Company in the said account with the Hills-Corbet Co. should be $36,746.26.

X.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

The Craig Lumber Co. paid the Hills-Corbet Co. on the said account as follows:

$19,943.82, for which credit is given on the bill of particulars; three checks of $3,500.00 each, $10,500.00, making a total of $30,443.82. But it appears from the evidence of F. A. Cloudy that $519.12 of the $10,-500.00 furnished him was used in paying employees of the Craig Lumber Company and not employees of the Hills-Corbet Co. The net amount of cash paid on the account is $29,924.70. The Craig Lumber Co., however, paid out for board of the employees of the Hills-Corbet Co. while working on the contract the sum of $3,324.00; and the total credits on the account to which the Craig Lumber Co. is entitled is $33,-248.70, and the amount which is owing to the Hills-Corbet Co. on the whole account is $3,497.56.

XI.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Although the contract of October 21st, 1917, was breached as to its terms by both parties thereto, during performance of its terms, and especially by the Craig Lumber Company in not making its payments

as they came due, the Hills-Corbet Company never attempted to reclaim possession, or asserted a right to reclaim possession of the machinery or equipment they furnished until after the bankruptcy proceedings were begun. [247]

XII.

The Court erred in admitting in evidence the testimony of W. W. Corbet tending to show and upon which the Court found, that the written contract between the Hills-Corbet Co. and the Craig Lumber Co. was changed by F. J. Tromble so as to throw the cost of the board of the employees of the Hills-Corbet Co. upon the Craig Lumber Co.

XIII.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

The contract of October 31st, 1917, is not a contract of conditional sale, but a contract to build and equip a sawmill, and when Hills-Corbet Co. purchased the machinery, etc., to fill said contract they bought it for the Craig Lumber Co. and it thereupon became the property of the Craig Lumber Co.

XIV.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

But if the said machinery, equipment, etc., was ever the property of the Hills-Corbet Co., then by the terms of the contract, as construed by the parties in the course of their dealings the sale was complete, and the title passed, and the reservation of title, or attempted reservation of title in the contract is merely a security in the nature of an equitable mortgage.

XV.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

As the sums due from the Craig Lumber Co. to the Hills-Corbet Co. for the purchase of machinery and material were the earliest payable under the contract, the payments made should be first applied to these, and as amounts paid exceed the cost of such material, machinery, etc., the property sought to be reclaimed is paid for. [248]

XVI.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

In any view of the facts and the law, the Hills-Corbet Co. are not the owners of the property they have petitioned to have the trustee deliver to them, and their petition should be denied with costs.

XVII.

The Court erred in making the XI finding of fact reading as follows:

That the machinery covered by said contract of sale never passed under the "after-acquired" clause in the mortgage of the Bank of Alaska, one of the parties to this action, for the reason that the mortgagor never did "acquire" such machinery, the title never having passed.

XVIII.

The Court erred in making the XII finding of fact reading as follows:

That the machinery, material, etc., furnished and delivered under said contract, including the work and labor performed thereunder and the 10% and 15%

provided for in said contract as aforesaid, amount to the sum of $32,539.74, but under the contract the mill was to be built and installed for $32,125.00, therefore the Court finds the latter sum ($32,125) as being the "invoice under contract and 10% on labor."

XIX.

The Court erred in making the XIV finding of fact reading as follows:

That the total payments made is the sum of $19,-943.82; that in addition to said payment the Craig Lumber Company, debtor, is entitled to a credit of $8,312.58 which it paid out for labor for the Hills-Corbet Company under the contract, leaving a total balance of $9,827.39 due to the Hills-Corbet Company. [249]

XX.

The Court erred in making the XVI finding of fact reading as follows:

That the evidence to the effect that the Craig Lumber Co., debtor, agreed to board the men employed by the Hills-Corbet Co. in the doing and performing of said work, is absolutely undisputed, and the Court finds that the Craig Lumber Co. did agree to board said men, assuming the indebtedness therefor.

XXI.

The Court erred in making the XVII finding of fact reading as follows:

That the total amount due the Hills-Corbet Company under the contract, after making the application of the payments to the extras and to the contract as in these findings set forth, is the sum of $9,827.39, together with interest at the rate of 8% from July

1st, 1918, said date being more than 30 days after the completion of the contract.

XXII.

The Court erred in awarding interest from July 1st, 1918, on the amount it found due, on the alleged conditional sale.

XXIII.

The Court erred in its conclusion of law numbered I, reading as follows:

That the contract of sale attached to and made a part of the complaint filed in this case is a conditional sale contract and the property covered thereby and described in the specifications attached thereto and made a part of said contract remain the property of the Hills-Corbet Company until the full purchase price is fully paid and the title to said property was not to pass until the same was fully paid for.

XXIV.

The Court erred in its conclusion of law numbered II, reading as follows:

That the machinery is so attached by bolts and screws as to [250] be easily moved without damaging the building and, therefore, the conditional sale contract whereby the Hills-Corbet Company retain title to said machinery is in no way affected thereby.

XXV.

The Court erred in making the conclusion of law numbered III, reading as follows:

That the claim of the Bank of Alaska, one of the parties to this action, to the machinery covered by the said conditional sale contract, is without force or effect; that the machinery did not pass under the

"after-acquired" clause of the mortgage, under which the said bank claims said machinery, for the reason that the mortgagor never did acquire such machinery, the title never having passed, and the title to the said machinery remained in the Hills-Corbet Co., under and by virtue of the aforesaid conditional sale contract.

XXVI.

The Court erred in its conclusion of law numbered IV, reading as follows:

That the application of payments other than those specifically applied should be and are first applied by the Court upon the unsecured indebtedness of the debtor to the Hills-Corbet Company, and the balance upon the conditional sale contract.

XXVII.

The Court erred in making the conclusion of law numbered V, reading as follows:

That the Court finds that the Hills-Corbet Company is entitled to a judgment against the Bank of Alaska and the U. S. Fidelity & Guaranty Company in the sum of $9,827.39, together with interest thereon at the rate of 8% per annum from July 1st, 1918.

XXVIII.

The Court erred in rendering any judgment whatsoever against the Bank of Alaska, and such judgment is wholly unsustained by the pleadings, the stipulation, or anything else in the record; and the record conclusively shows that there is no present liability from the [251] said bank to the Hills-Corbet Co. and will not be until there shall be a final decision of this cause in favor of the Hills-Corbet Co.

And for said errors appellants pray that the said judgment be reversed and the petition dismissed.

JOHN B. MARSHALL,
Attorney for Bank of Alaska.
J. H. COBB,
Attorney for Trustee.

Filed in the District Court, District of Alaska, First Division. Aug. 6, 1920. J. W. Bell, Clerk. By ————, Deputy. [252]

In the District Court for Alaska, Division Number One, at Juneau.

No. 31—IN BANKRUPTCY.

No. 1964–A.

In the Matter of the CRAIG LUMBER CO, a Corporation,

Bankrupt.

HILLS–CORBET CO., a Copartnership Composed of F. R. HILLS and W. W. CORBET,

vs.

E. L. COBB, as Trustee of the CRAIG LUMBER COMPANY, a Corporation.

Bankrupt.

Petition for Allowance of Appeal.

E. L. Cobb, as trustee of the Craig Lumber Company, a corporation, bankrupt, and the Bank of Alaska, a corporation, conceiving themselves aggrieved by the judgment and order of the Court,

made herein on the 31 day of July, 1920, in the above-entitled cause, for the reasons set out in their assignments of error filed herewith, pray this Honorable Court to grant them an order allowing an appeal from said judgment and order to the Honorable the United States Circuit Court of Appeals for the Ninth Circuit, and fix the amount of security to be given by the said bank as a supersedeas on said judgment.

JOHN B. MARSHALL,
Atty. for Bank of Alaska.
J. H. COBB,
Attorney for Trustee.

Upon consideration of the above and foregoing petition it is ordered that the appeal prayed for be, and the same is hereby granted; and it is further ordered that a transcript of the record be transmitted by the clerk to the clerk of the Appellate Court. And the security to be given is fixed at $12,500.00.

Dated this the 6th August, 1920.

ROBERT A. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Aug. 6, 1920. J. W. Bell, Clerk. By ————, Deputy.

Entered Court Journal No. Q, page 5. [253]

In the District Court for Alaska, Division Number One, at Juneau.

No. 31—IN BANKRUPTCY.

1964–A.

In the Matter of the CRAIG LUMBER CO, a Corporation,

Bankrupt.

HILLS–CORBET CO., a Copartnership Composed of F. R. HILLS and W. W. CORBET,

vs.

E. L. COBB, as Trustee of the CRAIG LUMBER COMPANY, a Corporation,

Bankrupt.

Citation.

The President of the United States to the Hills-Corbet Co., a Copartnership Composed of F. R. Hills and W. W. Corbet, and to Newark L. Burton, Their Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, State of California, within thirty days from the date hereof, pursuant to an appeal filed in the clerk's office for the District Court for Alaska, Division Number One, in a cause where E. L. Cobb, as trustee of the Craig Lumber Co., and the Bank of Alaska are appellants, and you are appellees, then and there to show cause, if any there be, why the judgment and decree mentioned

in said appeal should not be corrected, and speedy justice done to the parties in that behalf.

WITNESS, the Honorable EDWARD DOUGLASS WHITE, Chief Justice of the United States, this the 10th day of August, 1920.

ROBERT W. JENNINGS,
Judge.

Service of the above and foregoing citation admitted this the 10th day of August, 1920.

N. L. BURTON,
Attorney for the Hills-Corbet Co., Appellees.

Filed in the District Court, District of Alaska, First Division. Aug. 10, 1920. J. W. Bell, Clerk. ————, Deputy. [254]

In the District Court for Alaska, Division Number One, at Juneau.

No. 31—IN BANKRUPTCY.

1964–A.

In the Matter of the CRAIG LUMBER CO., a Corporation,

Bankrupt.

HILLS–CORBET CO., a Copartnership Composed of F. R. HILLS and W. W. CORBET,

vs.

E. L. COBB, as Trustee of the CRAIG LUMBER CO.,

Bankrupt.

Supersedeas Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS, that we, the Bank of Alaska, a corporation, as principal, and E. A. Rasmuson and Helen D. Lynch, sureties, are held and firmly bound unto Hills-Corbet Co., a copartnership, in the sum of twelve thousand five hundred dollars, for the payment of which sum well and *and* truly to be made we hereby bind ourselves, our and each of our heirs, executors, administrators and successors, jointly and severally firmly by these presents.

The condition of the above obligation is such, however, that whereas, in the above-entitled court and cause, on the 31st day of July, 1920, a judgment was rendered in favor of said Hills-Corbet Co. and against the Bank of Alaska for the sum of $9,827.39, besides interest and costs, and adjudging certain property, of which said sum was the proceeds, to have been the property of said Hills-Corbet Co., and not of the said bankrupt, and said E. L. Cobb, as trustee, etc., and the said Bank of Alaska has appealed from said judgment and decree to the United States Circuit Court of Appeals for the Ninth Circuit.

Now, if the said appellants shall prosecute said appeal to effect, and pay all such damages and costs as may be awarded against them if they fail to make their plea good, then this obligation shall be null and void; otherwise to remain in full force and virtue. [255]

Witness our hands this 7th day of August, 1920.

BANK OF ALASKA,
E. A. RASMUSON,
President.
HELEN D. LYNCH.
E. A. RASMUSON.

Approved Aug. 10, 1920.

ROBERT W. JENNINGS,
Judge.

Filed in the District Court, District of Alaska, First Division. Aug. 10, 1920. J. W. Bell, Clerk. By ————,Deputy. [256]

In the District Court for Alaska, Division Number One, at Juneau.

1964–A.

HILLS-CORBET CO.

vs.

E. L. COBB, as Trustee, and the BANK OF ALASKA.

Praecipe for Transcript of Record.

To the Clerk for the District Court for Alaska, Division No. 1.

Sir: You will please make up the transcript of the record for the United States Circuit Court of Appeals for the Ninth Circuit, in the above-entitled cause, and include therein the following papers:

1. Petition of the Hills-Corbet Co. and Pltfs. Ex. "A" (Specification).

2. Bill of Particulars and Pltfs Ex. "A" (Blueprint).
3. Amended Bill of Particulars, filed March 17, 1920.
4. Demurrer of E. L. Cobb, Trustee.
5. Order of Referee Sustaining Demurrer.
6. Petition of Review of Said Order.
7. Order of District Court Overruling Demurrer.
8. Answer of Trustee.
9. Reply of Hills-Corbet Co.
10. Stipulation of January 20, 1920.
11. Order to Try Before District Court.
12. Bond of Bank of Alaska.
13. Findings of Fact and Conclusions of Law.
14. Judgment.
15. Opinion and Supplemental Opinion.
16. Bill of Exceptions.
17. Assignments of Error.
18. Petition of Appeal and Order Allowing.
19. Citation.
20. Supersedeas Bond.
21. This Praecipe.

Said transcript to be made up in accordance with the rules of said Appellate Court and the rules of this court.

J. H. COBB,
Attorney for Trustee.
JNO. B. MARSHALL,
Attorney for Bank of Alaska.

Filed in the District Court, District of Alaska, First Division. Aug. 10, 1920. J. W. Bell, Clerk. By ————, Deputy. [257]

In the District Court for the District of Alaska, Division No. 1, at Juneau.

United States of America,
District of Alaska,
Division No. 1,—ss.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, J. W. Bell, Clerk of the District Court for the District of Alaska, Division No. 1, hereby certify that the foregoing and hereto attached 257 pages of typewritten matter, numbered from 1 to 257, both inclusive, constitute a full, true, and complete copy, and the whole thereof, of the record as per praecipe of the appellant on file herein and made a part hereof, in the cause wherein E. L. Cobb, trustee, and the Bank of Alaska are appellants and Hills Corbet Company, is appellee, No. 31—Bankruptcy, No. 1964–A, as the same appears of record and on file in my office, and that the said record is by virtue of petition and citation on appeal issued in this cause, and the return thereof in accordance therewith.

I do further certify that this transcript was prepared by me in my office, and the cost of preparation, examination and certificate, amounting to $113.70, has been paid to me by counsel for appellant.

I do further certify that plaintiff's original Exhibit "A," Specifications and Blue-print, are attached hereto.

IN WITNESS WHEREOF I have hereunto set my hand and the seal of the above-entitled court this 21st day of August, A. D. 1920.

[Seal] J. W. BELL,
Clerk.

By ——————————,
Deputy.

[Endorsed]: No. 3552. United States Circuit Court of Appeals for the Ninth Circuit. In the Matter of the Craig Lumber Company, a Corporation, Bankrupt. E. L. Cobb, as Trustee of the Craig Lumber Company, a Corporation, Bankrupt, and Bank of Alaska, a Corporation, Appellants, vs. Hills-Corbet Company, a Copartnership Composed of F. R. Hills and W. W. Corbet, Appellee. Transcript of Record. Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

Filed September 2, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

No. 3552

United States
Circuit Court of Appeals
For the Ninth Circuit.

E. L. COBB, as Trustee of the CRAIG LUMBER CO., Bankrupt, and THE BANK OF ALASKA,
Appellants,

vs.

HILLS-CORBET COMPANY, a Corporation, Composed of F. R. HILLS and W. W. CORBET,
Appellees.

BRIEF FOR THE APPELLANTS.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

J. H. COBB and
J. B. MARSHALL,
Attorneys for Appellants.

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

No. 3552.

Appeal from the District Court for Alaska, Division No. 1.

E. L. COBB, as Trustee of the CRAIG LUMBER CO., Bankrupt, and the BANK OF ALASKA,

Appellants,

vs.

HILLS-CORBET CO., a Corporation Composed of F. R. HILLS and W. W. CORBET,

Appellees.

Brief for the Appellants.

STATEMENT OF THE CASE.

We think the questions arising in this appeal can be best presented by a statement in chronological order of the facts upon which they arise.

1st. On October 31st, 1917, the Craig Lumber Co. and the Hills-Corbet Co., Appellees, made and entered into a contract to build and equip a sawmill, which reads as follows:

"THIS AGREEMENT, by and between, Hills-Corbet Company, of Seattle, Wash., hereinafter called the Company, and the CRAIG LUMBER COMPANY, of Craig, Alaska, hereinafter called the Purchaser,

"The Company agrees to furnish all Machinery, Belt, Saws, Pipe and Pipe Fittings, Blow Pipe and Fittings and Iron necessary to equip a saw-mill at Craig, Alaska, in accordance with the attached specifications and drawings, which specifications and drawings become a part of this agreement.

"The above equipment to be billed F. O. B. ships tackle, Seattle, Wash.

"The Company also agrees to build buildings above pile foundations, install machinery, put on belting, install piping and turn the Mill over to the Purchaser ready to run according to the attached drawings and specifications. The Purchaser is to drive all Piles.

"The Purchaser agrees to properly care for all apparatus and material delivered until the same is fully paid for, and to hold the Company harmless against the payment of any taxes assessed against the apparatus and material after it shall have been shipped. The Company shall keep the property, herein agreed to be sold, fully insured against damages or loss by fire, and to carry marine and casualty insurance for the benefit of the Company and the Purchaser as their interest may appear, but in so insuring the property, the Company shall only be held liable for the exercise of a reasonable judg-

ment in the selection of Insurance Company or Insurance Companies, with which it places the risk.

"The Company agrees to use all possible diligence in prosecution of the work and to expedite the delivery and installation of machinery to the best of its ability. The Company is not in any event to be held liable for loss, damage, detention, or delay caused by fire, strikes, lockouts, civil or military authority, or insurrection or riot, action of the elements, forces of nature, or any other cause beyond its control, nor in any event consequential damages.

"The Purchaser agrees to pay all war taxes assessed or due on any of the material or work of whatever nature,

"If for any reason the work is discontinued or interrupted before completion, the Purchaser agrees to pay the Company within sixty days all moneys due at the time of the interruption of the work, and also all sums which have been retained by the Purchaser as a guarantee for the fulfillment of the work or for any other reason, including the company's commission and all unpaid labor charges.

"The title to the apparatus and material herein agreed to be sold, shall not pass from the Company until all payments hereinunder shall have been fully paid in cash. Upon default in any such payments the Company may re-take the property agreed to be sold. In such event the money heretofore paid by the Purchaser to the Company shall be presumed to be the amount of damages sustained

by the breach of this Agreement and shall be retained by the Company as liquidated damages for the breach.

"The Purchaser agrees to pay to the Company actual cost of all labor, machinery, equipment and building material used in connection with the work (lumber and piles excluded), the cost of insurance and all costs except freight and transportation charges of material and men from Seattle, Wash. to Craig, Alaska, plus ten (10%) per cent. It being agreed that the Purchaser is to furnish all wood building material and to pay the freight and all transportation charges of material and men from Seattle, Wash., to Craig, Alaska.

"It is agreed that the cost of machinery, material and equipment is to be the cost F. O. B. ships tackle, Seattle, Wash., plus fifteen (15%) per cent to cover the operation expenses of the Company. The cost of labor is to be the actual cost to the Company.

"It is agreed that the Purchaser will pay to the Company fifty (50%) per cent of the cost of all machinery, material and equipment upon presentation of invoices with shipping papers, twenty-five (25%) per cent in forty days from due date of first payment and balance in thirty (30) days from completion of contract. The invoice to include the ten (10%) per cent profit to the Company. Labor charges are to be paid in full by the Purchaser every month upon presentation of a bill by the Company which shall not include the ten (10%) per cent profit to the Company. The ten (10%)

per cent profit to be paid in thirty (30) days from completion of contract.

"It is agreed that the Purchaser has the right at any time to examine the books and requisitions of the Company to ascertain the cost of material, machinery and equipment purchased by them.

"It is agreed that the cost of the mill complete as per specifications and drawings will not exceed the estimate of thirty-two thousand one hundred and twenty-five & 00/100 ($32,125.00) Dollars.

"It is agreed that the Company will do the work in a workmanlike manner and when the installation is completed it will be ready for the operation and will be left in good running order." (Rec. 5–9.)

The "drawings" referred to in the contract is Plaintiff's Exhibit "A" (not printed) and are the ordinary drawings of a building giving its dimensions, the positions of the machinery, etc., to be installed, and need not be further noticed. The "specifications" referred to are found in the record, pages 9–23, and consist of an itemized statement of the machinery apparatus, and material to be furnished by appellees under the contract.

2d. At the time of the making of this contract it was contemplated that the appellees should purchase on the open market the machinery, apparatus, material, and equipment necessary to fill it, though they had on hand one piece of machinery left over from a former contract, ~~with~~ worth about eight hundred ($800.00) dollars, which they used. (Rec., pp. 110–114.)

3d. The material, machinery and equipment

called for in the contract was shipped from Seattle to Craig, Alaska, from November 15, 1917, to May 29th, 1918, inclusive. In the same period other goods not embraced in the contract, amounting to five thousand nine hundred fifty-eight dollars and seventy-nine cents ($5,958.79) were purchased and shipped by appellees to the Craig Lumber Company. The appellees in each instance charged the Craig Lumber Company with the cost of the goods, whether purchased to fill the contract or otherwise, plus fifteen (15%) per cent; and the charges were all made upon one open account, and all payments made by the Craig Lumber Company were credited upon this one account, in so far as they were credited at all. (Rec., pp. 110–114.)

4th. When the shipment leaving Seattle November 27th, 1917, reached Craig, a part thereof consisting of brick, cement, and an electric generator, was lost through the breaking down of the dock. No question was raised as to whose loss this was, but another lot was at once sent to replace the loss, and both lots charged to the Craig Lumber Company.

5th. Some time about the first of December, 1917, one F. A. Cloudy, as the agent and representative of Hills-Corbet Company, proceeded to Craig, Alaska, with a force of men, for the purpose of constructing the buildings and installing the machinery under the contract. The Hills-Corbet Company employees were all boarded by the Craig Lumber Company, it having already built and equipped a boarding-house at the mill. It seems

that when the first month's wages became due, Hills-Corbet Company failed to furnish Cloudy funds to pay, and the men threatened to quit. The Craig Lumber Company paid to Hills-Corbet Company through Cloudy on January 5th, 1918, a check for three thousand five hundred ($3,500) dollars (Rec. 237, 238); on January 24th, 1918, another check for three thousand five hundred ($3,500) dollars, and on March 26th, 1918, a third check for three thousand five hundred ($3,500) dollars (Rec., pp. ——.) These three checks aggregating then thousand five hundred ($10,500.00) dollars were deposited in the Bank of Alaska at Wrangell, and their proceeds checked out by F. A. Cloudy as the agent of Hills-Corbet Company. In addition to the said sum of ten thousand five hundred ($10,500.00) dollars, the proceeds of said three checks, Cloudy, as agent of Hills-Corbet Company, drew checks on the Bank of Alaska at Wrangell for the sum of six thousand ($6,000.00) dollars or thereabouts, which were paid by the bank out of funds of the Craig Lumber Company. This latter amount is of no particular importance to the solution of the questions involved; the point is that the three checks, aggregating ten thousand five hundred ($10,500.00) dollars *were paid on the contract.* (Rec., p. 152.)

6th. The Craig Lumber Company boarded the employees of Hills-Corbet Company while they were at work on the contract, at a cost of three thousand three hundred and twenty-four ($3,324.00) dollars. (Rec., pp. 217–220.)

7th. In addition to the moneys paid by the Craig Lumber Company to Hills-Corbet Company through Cloudy, the Lumber Company also paid directly to Hills-Corbet Company the following sums:

Dec. 8th, 1917	$4,020.44
Dec. 17th, 1917	3,812.23
Jan. 24, 1918	11.56
Feb. 1st, 1918	4,461.63
Feb. 20th, 1918	276.51
March 5th, 1918	361.45
March 18, 1918	5,000.00
July 19, 1918	1,000.00
Dec. 8, 1918	1,000.00
	$19,943.82

(Rec., p. 44.)

The first two of the above payments were expressly made on the contract, as no "extras" had at said dates been ordered. All said payments were credited by the Hills-Corbet Company upon the general open account, which included the entire business, both the contract and the "extras." (Rec., pp. 113, 114.)

8th. The total amount of money then paid by the Lumber Company to Hills-Corbet Company, including board of its men, was upward of thirty-nine thousand nine hundred ($39,900.00) dollars; the cost of the mill building, machinery, and equipment was fixed by the contract at not to exceed thirty-two thousand one hundred and fifty ($32,150.00), and the total value of the "extras" ordered was five thousand nine hundred fifty-eight dollars and

seventy-nine cents ($5,958.79); so that the cost of the mill and extras was more than covered by the payments aforesaid; *but of the moneys paid to Hills-Corbet Company through Cloudy, Cloudy advanced or paid out for the Lumber Company some six thousand ($6,000.00) dollars or seven thousand ($7,000.00) dollars, as wages to the employees of the Lumber Company.* (Rec., pp. 144–152.)

9th. On Feb. 25th, 1919, the petition in bankruptcy was filed and the Craig Lumber Company adjudged bankrupt on March 19th, 1919.

10th. On July 19th, 1919, the Hills-Corbet Company filed its petition in the Bankruptcy Court setting up said building contract, alleging it to be conditional sale, a copy of which with bill of particulars was attached to the petition as a part thereof, a balance alleged due on the purchase money of the machinery and equipment of twelve thousand nine hundred eighty dollars and thirty-six cents ($12,980.36), and praying for an order on the trustee in bankruptcy to deliver the machinery, etc., to them. (Rec., pp. 1–45.)

11th. The trustee demurred to the petition on the ground substantially that the petition, with exhibits attached, showed that the contract was not a conditional sale, and that petitioners were not the owners of the property, and not entitled to its return. (Rec., pp. 46, 47.)

12th. The referee sustained the demurrer in a short opinion which seems to us conclusive of this question. (Rec., pp. 48–51.)

13th. Hills-Corbet Co. petitioned the District Court for a review of the referee's decision (pp. 52–55), and the District Judge reversed the decision of the referee. (Rec., pp. 56–59.)

14th. The trustee thereupon filed his answer denying all the material allegations of the petition and affirmatively pleading that the machinery, etc., was the property of the bankrupt; that it was purchased for it by petitioners, as its brokers and agents; further plead payment in full; and further set up that it was contemplated at the time of the making of the contract that the machinery, etc., mentioned therein should be attached to and become a part of the mill building and realty of the Craig Lumber Company; that it was so attached and now is a part of the realty; and the Bank of Alaska, a valid creditor of the Craig Lumber Company, has a mortgage on the said realty to secure a valid debt of about $50,000.00 and took said mortgage without notice of the alleged claim of said petitioners. (Rec., pp. 59–62.)

The allegations of the answer were put in issue by the reply of petitioners. (Rec., pp. 63, 64.)

15th. The following stipulation was then made and filed:

"This agreement and stipulation made this 19th day of January, 1920, by and between Hills-Corbet Company of Seattle, Washington, hereinafter called the Company, Bank of Alaska, hereinafter called the Bank, and E. L. Cobb, Trustee in Bankruptcy, in the matter of Craig Lumber Company, bankrupt, hereinafter called the Trustee, Witnesseth, that—

"Whereas, the company has filed before H. B. Le Fevre, referee in bankruptcy in the matter of Craig Lumber Company, bankrupt, a petition praying for the return to it of certain sawmill machinery and other property now in possession of the trustee; and

"Whereas, the company claims to own said property under and by virtue of a contract attached to said petition upon the ground that payments under said contract have never been fully made; and

"Whereas, the bank desires to foreclose said mortgage and make a sale of the real estate and the machinery and property now situated thereon as a whole prior to the decision of the referee or the District Court for the District of Alaska, Division No. 1, upon the controversy between the parties thereto:

"Now, therefore, it is agreed between the parties hereto as follows:

"1. That the bank shall sell the machinery and other property claimed by the company and shall account therefor as follows: The bank shall deliver to the company a bond in the penal sum of Twelve Thousand ($12,000.00) Dollars executed by the bank as principal and the United States Fidelity and Guaranty Company, a corporation, of Baltimore, Maryland, as surety, conditioned that the bank shall pay to the company such sum of money as shall be found by the United States District Court for the Territory of Alaska, Division No. 1, or by a higher court in case of appeal or review, to be due the company under and by virtue of the contract relied

on by said company in their petition, providing the final judgment of the United States District Court for the Territory of Alaska, or any other higher court upon appeal or review, shall sustain the rights of the company as against the rights of the Bank in and to the said machinery and property. Said bond shall contain a provision that judgment thereon may be rendered by said court or courts upon the determination of the controversy herein referred to.

"2. The bank consents to be bound by the final judgment in the controversy over the said machinery and property whether the final judgment be rendered by the District Court for the Territory of Alaska, Division No. 1, or by a higher court on appeal, and to that end hereby enters its appearance in this action for that purpose.

"3. That the issues of law and fact raised by the petition of the company and the answer of the trustee be returned to the United States District Court for the Territory of Alaska, Division No. 1, for hearing and decision and to that end that the said District Court enter an order in this cause directing the return by the referee to the clerk of said court of all of the pleadings, papers, files and entries filed with or made by the referee in the controversy referred to for the determination of said issues in the first instance by the said District Court.

"4. That this stipulation and agreement shall not be binding or effective for any purpose until the bond referred to in paragraph one shall be executed and approved by Newark L. Burton or

Frank P. Helsell, attorneys for the company, and until the said District Court enters an order approving this stipulation and an order as mentioned in paragraph 3 hereof." (Rec., pp. 65–67.)

The stipulation was approved by the court (Rec., p. 68); an order for the hearing before the District Judge was made (Rec., p. 68); the Bank of Alaska gave the bond as per the stipulation (Rec., p. 69).

16th. The matter came on for hearing before the Court, and the Court made findings of fact and conclusions of law in favor of petitioners, and rendered judgment in favor of petitioners and against the Bank of Alaska for the sum of $9,827.39 with 8 per cent interest from July 1st, 1918, and costs. (Rec., pp. 72–82.)

The trustee and the Bank of Alaska thereupon removed the cause into this court for correction and revision upon the following

ASSIGNMENTS OF ERROR.

Now comes E. L. Cobb, as trustee of the Craig Lumber Co., a corporation, bankrupt, and the Bank of Alaska, a corporation, and assigns the following errors committed by the Court during the trial and in the rendition of the judgment and decree in the above-entitled matter, and upon which they will rely in the Appellant Court:

I.

The Court erred in reversing the ruling of the referee, sustaining the demurrer to the petition of appellees and in overruling said demurrer.

II.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

The contract, a copy of which is attached to the petition of the Hills-Corbet Co, herein, was made between the Craig Lumber Co. and the Hills-Corbet Co. a copartnership, on the 31st of October, 1917.

III.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

At the time of the making of the contract the Hills-Corbet Co. had none of the machinery and material they were to furnish under the contract, except one engine worth about $800.00, and it was contemplated by both parties that they should buy such machinery and material on the open market and ship to Craig, Alaska.

IV.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Hills-Corbet Co. did so purchase the machinery and material, as required to fill the contract; the first shipment was made about November 15th, 1917. About the same time they also sent a force of men to Craig under F. A. Cloudy to put and remodel the mill buildings, and do the work of installation of machinery called for in the contract. Fifty per cent of this shipment was paid in cash by the Craig Lumber Company, as called for in the contract.

V.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Upon reaching Craig with the laborers provided to do the work, or shortly thereafter, Hills-Corbet Co. was paid $10,500.00 in three checks by the Craig Lumber Co., the proceeds of which were deposited in the Bank of Alaska to the credit of their agent F. A. Cloudy to be used in paying the wages of the employees of Hills-Corbet Co. But no arrangements were made by Hills-Corbet Co. for boarding their men, and such board was furnished by the Craig Lumber Co. at a cost to it of at least $1.50 per day per man.

VI.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

The second shipment of material was made November 27th, 1917. When this shipment reached Craig, Alaska, and was unloaded on the dock, the dock gave way from the weight and a part of the shipment of between $2,000.00 and $3,000.00 in value was lost. This was at once reordered and paid for in full by the Craig Lumber Company, no question being raised as to whose goods they were, and who were to stand the loss. Fifty per cent of this shipment, in addition to the goods lost and paid for in full was also paid by the Craig Lumber Co. in accordance with the terms of the contract.

VII.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Other shipments were made from time to time, the last made being in April, 1918, but payments thereafter seem to have been made by the Craig Lumber

Co. in gross sums as money was available, without reference to the terms of payment of fifty per cent on invoices as provided in the contract.

VIII.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

In the meantime, beginning on January 23d, 1918, and ending May 29th, 1918, the Craig Lumber Company ordered from time to time of Hills-Corbet Co. other machinery and goods, not mentioned or included in the contract. Such goods and machinery Hills-Corbet Co. purchased on the market to fill the orders, and charged the Craig Lumber Company the same commission or profit they were to have for goods and machinery purchased under the contract —that is, the cost price plus fifteen per cent, plus ten per cent. These goods were denominated "Extra" in the petitioners' bill of particulars and aggregated $4,436.62, including the commission or profit. The total cost of machinery and material, including commission or profit, shipped under the contract aggregated $32,309.62. All of the goods, however, were charged by Hills-Corbet Co. to the Craig Lumber Company on an open account, and all moneys paid were credited on the same account, whether bought or paid under the contract or otherwise. The segregation shown on the bill of particulars was made for the purpose of this proceeding, and does not appear on the Hills-Corbet Company's books.

IX.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

As under the contract the total cost to the Craig Lumber Company of the work and labor done and material furnished was to be limited to $32,125.00, the total charge against the Craig Lumber Company in the said account with the Hills-Corbet Co. should be $36,746.26.

X.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

The Craig Lumber Co. paid the Hills-Corbet Co. on the said account as follows:

$19,943.82, for which credit is given on the bill of particulars; three checks of $3,500.00 each, $10,-500.00, making a total of $30,443.82. But it appears from the evidence of F. A. Cloudy that $519.12 of the $10,500.00 furnished him was used in paying employees of the Craig Lumber Company and not employees of the Hills-Corbet Co. The net amount of cash paid on the account is $29,924.70. The Craig Lumber Co., however, paid out for board of the employees of the Hills-Corbet Co. while working on the contract the sum of $3,324.00; and the total credits on the account to which the Craig Lumber Co. is entitled is $33,248.70, and the amount which is owing to the Hills-Corbet Co. on the whole account is $3,497.56.

XI.

The Court erred in refusing the prayer of the trustee to make the following finding of fact:

Although the contract of October 21st, 1917, was breached as to its terms by both parties thereto, during performance of its terms, and especially by the

Craig Lumber Company in not making its payments as they came due, the Hills-Corbet Company never attempted to reclaim possession, or asserted a right to reclaim possession of the machinery or equipment they furnished until after the bankruptcy proceedings were begun.

XII.

The Court erred in admitting in evidence the testimony of W. W. Corbet tending to show and upon which the Court found, that the written contract between the Hills-Corbet Co. and the Craig Lumber Co. was changed by F. J. Tromble so as to throw the cost of the board of the employees of the Hills-Corbet Co. upon the Craig Lumber Co.

XIII.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

The contract of October 31st, 1917, is not a contract of conditional sale, but a contract to build and equip a sawmill, and when Hills-Corbet Co. purchased the machinery, etc., to fill said contract they bought it for the Craig Lumber Co. and it thereupon became the property of the Craig Lumber Co.

XIV.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

But if the said machinery, equipment, etc., was ever the property of the Hills-Corbet Co., then by the terms of the contract, as construed by the parties in the course of their dealings the sale was complete, and the title passed, and the reservation of title, or attempted reservation of title in the

contract is merely a security in the nature of an equitable mortgage.

XV.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

As the sums due from the Craig Lumber Co. to the Hills-Corbet Co. for the purchase of machinery and material were the earliest payable under the contract, the payments made should be first applied to these, and as amounts paid exceed the cost of such material, machinery, etc., the property sought to be reclaimed is paid for.

XVI.

The Court erred in refusing to make the following conclusion of law requested by the trustee:

In any view of the facts and the law, the Hills-Corbet Co. are not the owners of the property they have petitioned to have the trustee deliver to them, and their petition should be denied with costs.

XVII.

The Court erred in making the XI finding of fact reading as follows:

That the machinery covered by said contract of sale never passed under the "after-acquired" clause in the mortgage of the Bank of Alaska, one of the parties to this action, for the reason that the mortgagor never did "acquire" such machinery, the title never having passed.

XVIII.

The Court erred in making the XII finding of fact reading as follows:

That the machinery, material, etc., furnished and

delivered under said contract, including the work and labor performed thereunder and the 10% and 15% provided for in said contract as aforesaid, amount to the sum of $32,539.74, but under the contract the mill was to be built and installed for $32,125.00, therefore the Court finds the latter sum ($32,125) as being the "invoice under contract and 10% on labor."

XIX.

The Court erred in making the XIV finding of fact reading as follows:

That the total payments made is the sum of $19,-943.82; that in addition to said payment the Craig Lumber Company, debtor, is entitled to a credit of $8,312.58 which it paid out for labor for the Hills-Corbet Company under the contract, leaving a total balance of $9,827.39 due to the Hills-Corbet Company.

XX.

The Court erred in making the XVI finding of fact reading as follows:

That the evidence to the effect that the Craig Lumber Co., debtor, agreed to board the men employed by the Hills-Corbet Co. in the doing and performing of said work, is absolutely undisputed, and the Court finds that the Craig Lumber Co. did agree to board said men, assuming the indebtedness therefor.

XXI.

The Court erred in making the XVII finding of fact reading as follows:

That the total amount due the Hills-Corbet Com-

pany under the contract, after making the application of the payments to the extras and to the contract as in these findings set forth, is the sum of $9,827.39, together with interest at the rate of 8% from July 1st, 1918, said date being more than 30 days after the completion of the contract.

XXII.

The Court erred in awarding interest from July 1st, 1918, on the amount it found due, on the alleged conditional sale.

XXIII.

The Court erred in its conclusion of law numbered I, reading as follows:

That the contract of sale attached to and made a part of the complaint filed in this case is a conditional sale contract and the property covered thereby and described in the specifications attached thereto and made a part of said contract remain the property of the Hills-Corbet Company until the full purchase price is fully paid and the title to said property was not to pass until the same was fully paid for.

XXIV.

The Court erred in its conclusion of law numbered II, reading as follows:

That the machinery is so attached by bolts and screws as to be easily moved without damaging the building and, therefore, the conditional sale contract whereby the Hills-Corbet Company retain title to said machinery is in no way affected thereby.

XXV.

The Court erred in making the conclusion of law numbered III, reading as follows:

That the claim of the Bank of Alaska, one of the parties to this action, to the machinery covered by the said conditional sale contract, is without force or effect; that the machinery did not pass under the "after-acquired" clause of the mortgage, under which the said bank claims said machinery, for the reason that the mortgagor never did acquire such machinery, the title never having passed, and the title to the said machinery remained in the Hills-Corbet Co., under and by virtue of the aforesaid conditional sale contract.

XXVI.

The Court erred in its conclusion of law numbered IV, reading as follows:

That the application of payments other than those specifically applied should be and are first applied by the Court upon the unsecured indebtedness of the debtor to the Hills-Corbet Company, and the balance upon the conditional sale contract.

XXVII.

The Court erred in making the conclusion of law numbered V, reading as follows:

That the Court finds that the Hills-Corbet Company is entitled to a judgment against the Bank of Alaska and the U. S. Fidelity & Guaranty Company in the sum of $9,827.39, together with interest thereon at the rate of 8% per annum from July 1st, 1918.

XXVIII.

The Court erred in rendering any judgment whatsoever against the Bank of Alaska, and such judgment is wholly unsustained by the pleadings, the stipulation, or anything else in the record; and the record conclusively shows that there is no present liability from the said bank to the Hills-Corbet Co. and will not be until there shall be a final decision of this cause in favor of the Hills-Corbet Co.

The questions raised by the assignments of error may be summarized as follows:

1st. The Court erred in holding that the contract of October 31, 1917, between Hills-Corbet Co. and the Craig Lumber Company was a conditional sale; especially in view of the conduct of the parties under the contract.

2d. But conceding that it was a conditional contract, it was void as against the trustee under the Bankruptcy Act, and Chapter Thirty-one, Comp. Laws of Alaska, sections 740–743 and 748.

3d. The undisputed evidence showed that the Craig Lumber Co. had paid Hills-Corbet Co. *under the contract* the full contract price of the mill and equipment, and if anything was owing Hills-Corbet Co. from the Craig Lumber Co. it was for advances voluntarily made by Hills-Corbet Co. to pay employees of the Mill Company. But the Court erroneously deducted such advances from money paid on the contract, so as to make it appear that a balance was unpaid on the contract.

4th. The Court erred also in excluding the sum of $3,324.00 the cost of the board of the employees of the Hills-Corbet Co. paid by the Craig Lumber Co. from the cost of the mill, and then permitting the Hills-Corbet Co. to vary the contract by parol evidence, and recover upon a contract never plead at all.

5th. The Court erred in applying payments first to the satisfaction of the items of the general account for "extras," that is, for goods ordered in addition to those embraced in the contract of October 31, 1917.

6th. The judgment of the Court against the bank is erroneous and void because neither supported by pleadings, stipulation nor anything else in the record. There is no pleading of any kind against the bank, and under the stipulation and bond it was only to become liable on a contingency which has not yet arisen.

ARGUMENT.

In determining whether a given contract is a conditional sale, very little importance is attached by the Courts to what the parties have designated to or what they have said in the contract as to the intention that the title should not pass. Every such contract must be examined and construed as a whole and all its terms and conditions harmonized, if possible, and the intentions of the parties is to be gathered, not from any single clause or paragraph, but from the contract as a whole, and if necessary to its proper construction it must be read in the light of the surrounding circumstances

and conditions of the parties at the time it was made. Vol. 24, Ruling Case Law, sec. 744; Heryford vs. Davies, 102 U. S. 235; Chicago Ry. Co. vs. Merchants Bank, 136 U. S. 268.)

Now, applying the principles announced in the authorities *supra,* let us examine the contract upon which the petition in this case is based. What was the purpose and object sought by the parties thereto and what were the particular duties and obligations assumed thereto? It is obvious, in the first place, that the Lumber Company was contracting to acquire the construction of a sawmill fully equipped with machinery and all other apparatus for its successful operation at a price for material, labor, transportation, and all other costs not to exceed thirty-two thousand one hundred and twenty-five ($32,125.00) dollars. The petitioners undertook to furnish this at not to exceed the price specified; but their profits or commissions were limited to fifteen (15%) per cent for working expenses plus ten (10%) per cent upon the gross cost to them. The petitioners also obligated themselves not only to do the work, but to furnish all material which from the contract it was clearly in the minds of the parties that the petitioners would buy on the open market for the purpose of carrying out the contract; for the contract provided that the Lumber Company "has the right at any time to examine the books and requisitions of the petitioners to ascertain the cost of material, machinery, and equipment purchased by them." In other words, the Hills-Corbet Company, as contractors, were

buying for the Lumber Company machinery and equipment under and pursuant to a contract and an obligation on the part of the Lumber Company to repay them the exact advances made on behalf of the Lumber Company plus the stipulated profits or commissions. Now, in a straight sale, it is immaterial what the property sold may have cost the seller. The sole question in such case is the price the purchaser is to pay; but in this contract the supposed purchaser is entitled to know and is given the right to know the price, that is, the amount of money the supposed seller has advanced for it when it was bought on the open market, which advance the supposed purchaser has obligated itself to repay plus expenses and commissions.

In other words, at the time that the contract in question was made, the Hills-Corbet Company had nothing to sell and the Lumber Company did not and could not understand that they were buying anything from Hills-Corbet Company. The Lumber Company was merely employing the Hills-Corbet Company to build and equip their mill according to certain plans and specifications and not to exceed a cost to the Lumber Company of a stated sum. The Hills-Corbet Company accepted this employment and agreed to do the work and, as an incident thereto, to furnish all material including the machinery and apparatus and turn it over complete and ready to run. As a consideration for this the Hills-Corbet Company accepted the obligations of the Lumber Company to pay for same together with their profits thereon in three

certain installments named in the contract. Under such a contract all purchases of material, machinery, etc., made by the Hills-Corbet Company, who were acting merely as the agents or employees, were the purchases of the Lumber Company, and any cash paid by the Hills-Corbet Company out of their own funds was merely an advance by them as agents for their principal and for which they had the obligation of their principal to repay them, plus commissions for their services as such agents or employees.

Conditional contracts of sale are not favored in the law and a contract is never construed as a conditional sale if it admits of any other reasonable construction. (24 Ruling Case Law, sec. 744.) It certainly is just as reasonable to consider and construe the contract in question as providing for a purchase of the machinery and material by the Lumber Company through Hills-Corbet Company as their agents and to consider any money paid by the Hills-Corbet Company as advances made to their principal and secured by their principal's obligation to repay. So construing it, the property in question was never the property of the Hills-Corbet Company, and taking the contract as a whole, we think it reasonably admits of no other construction.

Viewed in this light and the contract as a whole, we think admits of no other construction, the clause in the contract providing that "the title to the apparatus and material herein agreed to be sold shall not pass from the Company until all payments

hereunder shall have been fully paid in cash," amounts to nothing more than an equitable mortgage upon property of the Lumber Company purchased for it by the petitioners as its agents. For it will be observed that the intended retention of title is not to secure the purchase price of the machinery and apparatus alone, but to secure the whole amount to be paid by the Lumber Company under the contract, which included not only the money paid for the machinery and apparatus, but labor, expenses, and profits.

But if it be conceded that when the Hills-Corbet Company purchased the sawmill machinery on the market to use in complying with their contract, they acquired the title in the first place, the same result is reached. They agreed to and did construct the mill and equip it with said machinery and apparatus in consideration of the obligation of the Lumber Company to pay the cost thereof, including labor and all money paid for material, including machinery, plus fifteen (15%) per cent working expenses and ten (10%) per cent profits or commissions. This obligation on the part of the Lumber Company was absolute and unconditional and was a valid and sufficient consideration capable of enforcement. When the mill was completed and finished, it was then the mill of the Lumber Company and everything in it belonged to the Lumber Company and was fully paid for by the obligation that the Lumber Company was under to the Hills-Corbet Company, and the case is governed by the decision of the Supreme Court of the U. S.

(Chicago Ry. Co. vs. Merchants Bank, 136 U. S. 268.)

An instructive case upon the question here at issue is found in Forsman vs. Mace et al., 35th Southern Reporter, p. 372. In that case a logging outfit, including teams, together with the logging contract, which the owners of the outfit had with a third party, was sold for a lump sum, the purchaser obligating himself to pay the lump sum in installments and to carry out the logging contract of the seller. There was a clause in the contract to the effect that the title to the logging outfit and teams should not pass until the whole price was fully paid—that is, the price of the outfit as well as the price for the logging contract. Default was made in the payment of some of the installments and the seller, alleging a conditional sale, sought to retake the logging outfit. The Court held that it was not a conditional sale, notwithstanding the attempted reservation of title and the provision that the title should not pass. The Court said that if it was not a sale of the logging outfit, it was not a sale of the contract. This was absurd, since the logging contract had been taken over and performed. So it was held that the sale was complete notwithstanding the reservation of the title, and that that provision of the contract was merely an equitable mortgage.

In the case of D. A. Tompkins Co. vs. Monticello Cotton Oil Co., 137 Federal, p. 625, there was a contract for the furnishing of machinery and the equipment of a cotton-oil mill. In the contract there was

a provision that the title to the machinery and equipment should not pass until the entire amount due under the contract should be paid. The Court had no difficulty in reaching the conclusion that it was not a conditional sale, but a complete contract in which the furnishing of the machinery was but an incident, and that the attempted reservation of the title was a mere equitable mortgage.

We think, therefore, that the District Court erred in overruling the decision of the referee sustaining the trustee's demurrer to the petition. But certainly the Court was in error in holding the contract a conditional sale in the light of the evidence as to the conduct of the parties under it. Let us briefly examine this conduct. In addition to buying the machinery and equipment called for in the contract of October 31st, 1917, Hills-Corbet Company was also employed by the Lumber Company to purchase further goods aggregating in value nearly six thousand ($6,000.00) dollars. On this machinery and equipment they got the same allowance for expenses and commissions as on the other. There is no pretense that the title to these so-called "extras" (so ~~demonstrated~~ denominated on their bill of particulars) was not the property of the Lumber Company. Now, Hills-Corbet Company in keeping their books, in each and every instance where a purchase was made, charged the Lumber Company with the cost therefor plus their commissions in one general open account, making no distinction whatever between purchases made under the contract and purchases of the "extras." Likewise, all payments

made were simply credited upon the one open account. Again, when several thousand dollars of material is lost on the shipment from Seattle to Craig, no question is raised by either party as to whose goods were lost. These goods were purchased by the Hills-Corbet Company to carry out its contract, and if under the contract there was a conditional sale of the goods, the loss of the goods was the loss of the Hills-Corbet Company and not of the Lumber Company. But, apparently, neither party to the contract considered at that time that the goods were not the goods of the Lumber Company. Again, payments in strict compliance with the terms of the contract ceased at least as early as February 1st, 1918, yet no effort was made by the Hills-Corbet Company to retake the goods or any part of them for a breach of the contract. Mr. Corbet testified (Rec., p. 198) that when the five thousand ($5,000.00) dollars was paid on March 18, 1918, he made no objections to the Lumber Company not living strictly up to the terms of the contract at that time. When asked what objections were made, he answered:

"We wanted more money."

"Q. What did you do when you did not get it?

"A. We asked them to get it for us as soon as possible.

"Q. They did not do it, did they?

"A. No.

"Q. What did you do then?

"A. Kept asking for it.

"Q. They did not make any payment then until July, did they?

"A. I think not.

"Q. And you turned the whole mill over, you say, about May 1st?

"A. It was completed about that time.

"Q. And turned over to them?

"A. I do not know whether they accepted it or not but I think so.

"Q. And they did not pay again until July 19th, and only one thousand ($1,000.00) dollars?

"A. Yes.

"Q. And you accepted that and credited them with it?

"A. Yes.

"Q. On December 8, 1918, they paid you another one thousand ($1,000.00) dollars and that was the last payment, you say, they made?

"A. Yes.

"Q. And you accepted that?

"A. Yes.

"Q. And you never asked for return of this property which you claim you never parted with title to until after bankruptcy proceedings, did you?

"A. Yes; we asked for it while it was still in the hands of receiver.

"Q. It went into the hands of a receiver, did it? That was the first time you asked for it, is it?

"A. I think so."

It appears from the record (pp. 199–201) that a receiver was asked for in the state courts in Washington but nothing was done under it, as the Dis-

trict Court for Alaska took charge of the matter under the bankruptcy law and that the petition the witness referred to was dated the 10th day of March, 1919. In other words, the Hills-Corbet Company treated the property as the property of the Lumber Company and insisted upon payment of moneys alleged to be due them and no suggestion was ever made that the property was theirs until bankruptcy intervened. This conduct is wholly inconsistent with their present claim of a conditional sale, but is wholly consistent with our theory of the contract as a mere building contract.

2d. The contract in this case was neither acknowledged nor recorded as required by sec. 740, Compiled Laws of Alaska, nor was there any renewal of it within one year as required by sec. 743, Compiled Laws of Alaska. Sec. 748, Compiled Laws of Alaska, reads as follows: "The provisions of the foregoing section of this chapter shall extend to all such bills of sale, deeds of trust; other conveyances of goods, chattels, or personal property as shall have the effect of a mortgage in lien of such property." By the provisions of sec. 740, a mortgage of personal property is void against creditors unless executed, acknowledged, and filed, and accompanied by affidavits of good faith.

Under the bankruptcy law, the trustee is in the position of a lienholder by either legal or equitable proceedings—that is, he is in the position of a creditor, and in any event the attempted reservation of title is void as against him. An instructive case upon this proposition is found in the 109th

Pacific, p. 382, Washburn vs. Intermountain Mining Co. In that case, there was a sale of a stamp-mill for the sum of ten thousand ($10,000.00) dollars, one thousand ($1,000.00) dollars of which was paid in cash, and the remaining nine thousand ($9,000.00) dollars on credit. The contract of sale was conditional, it being expressly agreed and understood that title should not pass until the nine thousand ($9,000.00) dollars was paid. The contract, however, further provided that the purchaser should have the right to remove the mill from the mine property of the seller and erect it upon his own mine, which was done. Subsequently, other parties acquired a lien under the lien laws of the State of Oregon, where the case arose and the contest over the mill arose between the seller and these lienholders. The Court held that while it was a conditional sale originally, that the mill had become a part of the purchaser's realty, and although the seller would have had a right to retake the property, it could not do so as against the lienholder on the realty of which the mill had become a part. In this case, there is no question that the status of the trustee is that of the creditor holding a lien. There is also no question but what this property had become a part of the realty, and the trustee was entitled to it.

3d. The undisputed evidence shows the following sums paid under the contract, to wit: Nineteen thousand nine hundred and forty-three dollars and eighty-two cents ($19,943.82), ten thousand five hundred ($10,500.00) dollars, thirty-three hundred

and twenty-four ($3324.00) dollars, and the further sum of at least six thousand ($6,000.00) dollars (Rec., p. 221), making a total of at least thirty-nine thousand seven hundred sixty-seven dollars and eighty-two cents ($39,767.82) paid Hills-Corbet Company by the Lumber Company under the contract. The aggregate amount due on the contract and all extras was thirty-eight thousand and eighty-four dollars and seventy-nine cents ($38,-084.79); that is to say, the cost of the mill and equipment under the contract was not to exceed thirty-two thousand one hundred twenty-five ($32,-125.00) dollars, and the Court found the aggregate value of the extras to be five thousand nine hundred fifty-eight dollars and seventy-nine cents (Rec., p. 76). The machinery and apparatus mentioned in the petition, then, was fully paid for and the title passed to the bankrupt in any event, unless the Court was correct in the interpretation of the evidence it adopted to avoid this effect. The Court, in the first place, applied payments to the discharge of the debts due for extras on the ground that such debt was unsecured while the sums due on the contract were secured debts (Rec., pp. 78 and 89). In other words, the Court in application of payments treated the sums due on the contract as a secured debt, but when it comes to giving relief, treats it as no debt at all, but as a conditional sale, notwithstanding the testimony of Mr. Cloudy that the three checks for three thousand five hundred ($3,500.00) dollars each was paid under the contract as well as the bank credit for six thousand

($6,000.00) dollars more. The Court avoids the effect of this by deducting therefrom and treating as no payment at all some six or seven thousand dollars of money that Hills-Corbet advanced to pay the employees of the Craig Lumber Company, and also refused to allow anything of a credit to the Craig Lumber Company for boarding the employees of the Hills-Corbet Company, the latter of which we will take up in a separate paragraph.

As to the former proposition, however, the error of the Court can be perhaps best demonstrated by a simple illustration:

Suppose A sells a horse to B for one hundred ($100.00) dollars and on a conditional sale that the title is not to pass till the one hundred ($100.00) dollars is paid. B goes to A and pays the one hundred ($100.00) dollars. This, of course, puts an end to the contract and the horse is B's. Suppose, however, the next day A for the accommodation of B pays to C, a creditor of B, fifty ($50.00) dollars for B's account. Can A, subsequently, go in and say to B, "You have not paid for my horse because I used part of the money you paid me to pay your debt to C?" Yet that is exactly what the Court has done in this case.

4th. The petition in this case is based upon the contract and upon nothing else. The contract provided that the expense of all labor should be borne by the Hills-Corbet Company and that the total cost, including labor, should not exceed thirty-two thousand one hundred twenty-five ($32,125.00) dollars. A part of the cost of labor, especially under

the conditions which existed in this case, is the board of the men. You cannot work men without feeding them. The justification for the Court striking out this charge of three thousand three hundred twenty-four ($3,324.00) dollars is found in the testimony of W. W. Corbet (Rec., p. 192) as to a conversation between himself and Mr. Tromble before the contract was executed in which the witness testified that Tromble said that the Lumber Company would assume that expense. No principle of law is better settled than that in the interpretation of a written contract negotiations leading up to it cannot be given as evidence. Yet the Court received this evidence and acted upon it so that the contract for the Craig Lumber Company instead of being limited to thirty-two thousand one hundred twenty-five ($32,125.00) dollars amounted to more than thirty-five thousand ($35,000.00) dollars.

5th. The matter of the application of payments by the Court has already been alluded to. The Court's only excuse or reason for applying the payments first to the liquidation of the extras is that the sums due for them were unsecured while the sums due on the contract were secured. But such a holding upsets the whole theory of the petitioners' case. The most the petitioners were entitled to was to credit the payments on the account at the time they were made.

6th. Upon what possible theory of the law the Court could render the judgment for money against the Bank of Alaska in this proceeding, we confess passes our comprehension. The contest on the

pleadings was solely between the petitioners and the trustee and involved the single question of the ownership of certain machinery and equipment of the sawmill which was in his hands as trustee. The Bank of Alaska, however, had a mortgage upon this property which it had foreclosed in the bankruptcy court. A stipulation is thereupon made that the property may be sold under the mortgage and that the bank should be bound by the final judgment in this case, whether the final judgment be rendered by the District Court for the Territory of Alaska, Division No. 1, or by a higher Court of Appeals, and for that end had entered its appearance in the action for that purpose. It also agreed to pay to the company such sum of money as might be finally found to be due Hills-Corbet Company and by virtue of the contract relied on by said company in their petition, and they gave a bond with the Security Company as surety in the penal sum of twelve thousand ($12,000.00) dollars (Rec., pp. 69–71) to better secure the bank's performance of its stipulation. Thus it will be seen that the Bank of Alaska only entered its appearance in this proceeding for the purpose of being bound by the final judgment between Hills-Corbet Company and the trustee—a contingency which has never arisen. Nevertheless the Court upon having determined that the property described in the petition was the property of Hills-Corbet Company and that there was nine thousand eight hundred twenty-seven dollars and thirty-nine cents ($9,827.39) owing thereon, proceeds at once to enter a money judg-

ment against the Bank of Alaska for that sum together with interest from July 1st, 1918. And to protect itself against an immediate execution, the bank was compelled to join in this appeal and give a supersedeas bond (Rec., p. 329). In our opinion, it needs no further argument to show that this was an arbitrary and illegal proceeding.

We respectfully submit that the judgment of the District Court for Alaska, Division No. 1, shall be reversed and the case remanded, with instructions to dismiss the petition.

JOHN B. MARSHALL,
J. H. COBB,
Attorneys for Appellants.

No. 3552

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

IN THE MATTER OF
THE CRAIG LUMBER COMPANY,
a Corporation,
Bankrupt.

E. L. COBB, as Trustee of the CRAIG LUMBER COMPANY, a Corporation, Bankrupt, and BANK OF ALASKA, a Corporation,
Appellants,

vs.

HILLS-CORBET COMPANY, a Co-partnership, composed of F. R. HILLS and W. W. CORBET,
Appellees.

Upon Appeal from the United States District Court for the District of Alaska, Division No. 1.

BRIEF OF APPELLEES

CASSIUS E. GATES,
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BRIEF OF APPELLEES

STATEMENT OF THE CASE.

Because of certain serious but inadvertent misstatements in appellants' brief, we will recite the facts of this case as we understand them:

Hills-Corbet Company, appellees, on October 31st, 1917, entered into a written contract with Craig Lumber Company, the present bankrupt, by which Hills-Corbet Company agreed to furnish and install in the mill of the Lumber Company at Craig, Alaska, certain described pieces of saw mill machinery (For contract, see Transcript, p. 5). The Hills-Corbet Company agreed to install machinery, put on belting, install piping and turn over mill ready to run according to attached drawings and specifications. The Lumber Company agreed to pay the Hills-Corbet Company actual cost of all labor, equipment and building material used in connection with the work, the cost of insurance and all costs except freight and transportation charges of men and material from Seattle, Washington, to Craig, Alaska, plus ten per cent. The Lumber Company agreed to furnish all wood building material and to pay the freight and all transportation charges of material and men from Seattle, Washington, to Craig, Alaska. And the cost of the machinery was to be cost, f. o. b. ship's tackle, Seattle, Washington, plus fifteen per cent to cover the operation expenses of the company. The cost of labor was to be actual cost to the company. Fifty per cent of cost of all material and machinery was to be paid upon presentation of invoices,

twenty-five per cent in forty days and balance thirty days from completion of contract. The Lumber Company agreed to pay labor charges in full every month and the ten per cent on labor should not be paid until thirty days after completion of the contract.

The Hills-Corbet Company shipped machinery and other materials to Craig, Alaska, in compliance with this contract, the total value of which at the contract price was $31,708.49 (Transcript, p. 82).

During the period of shipment, Mr. Tromble, manager of the Lumber Company, requested Hills-Corbet Company to purchase and ship certain items which had no connection with the contract, for example, track, mattresses, double-deck steel bunks and boom chains. The total bill for extra material and machinery was $5,958.79 (Transcript, pp. 84, 76; Testimony of Mr. Corbet, pp. 98-105). This item includes the amount of invoice No. 279 for $1,614.63 which was a second shipment of fire brick and other material (Transcript, p. 30). The first shipment was unloaded upon the dock of the Lumber Company at Craig; and, because of flimsy construction, the whole dock collapsed and the material was lost in the sea. The Lumber Company recognized that the fault was theirs; and, in reordering

it, asked Hills-Corbet Company to waive their profit, which was done (See Plaintiff's Exhibit "E"; Testimony of Cloudy, Transcript, pp. 130, 131).

Hills-Corbet Company hired F. A. Cloudy to go to Alaska and install the machinery. He took with him a crew of men to do that work. By the terms of the agreement, the Lumber Company was to drive all piles, furnish all lumber, and Hills-Corbet Company was only to build certain buildings above foundations. Yet, when Cloudy reached there, he found no work had been done by the Lumber Company to prepare the mill for the Hills-Corbet work. No lumber was cut; no foundations were in; and, at the request of Mr. Tromble, manager of the Lumber Company, Cloudy, with Hills-Corbet men, did all of this preliminary work (Transcript, p. 123).

In addition, Mr. Tromble ordered many changes and additions to the work covered by the contract. He ordered a new roof over the whole mill, the bunk house reconstructed, excavating for mud sills, overhauling the carriage, raising a beam over the carriage, building a pipe-line to the cook house, building a log-slip from the pond (Transcript, pp. 123-130).

Mr. Cloudy kept a strict account of the time put in on the various kinds of extra labor and marked it in his time book (See Exhibits "J" and "K"); and from these Mr. Corbet computed the amount of extra labor not on contract done by Hills-Corbet men, totaling $3,098.24 (See Exhibit "O").

Shortly after Mr. Cloudy reached Craig, Mr. Tromble, the manager of the Lumber Company, left and turned over to Mr. Cloudy all the affairs of the Lumber Company. Cloudy ran the cook house, bought provisions for the cook, bossed the employes of the Lumber Company clearing land (Transcript, pp. 145 and 155). In fact, he left Cloudy to occupy a dual capacity. He was acting as agent of the Hills-Corbet Company to install the machinery and as general manager of the mill besides. For it will be understood that the mill had been in operation before the date of our contract. We were simply making additions and improvements to the mill.

When Tromble, the manager, left, he made no provision to take care of the payroll of the workmen. Cloudy was in a quandary as to how the men would be paid. He made a special trip to Wrangell to call upon the cashier of the Bank of Alaska,

which was financing the Craig Lumber Company. Cloudy found that no provision had been made to meet the monthly payroll (Transcript, pp. 139-140). Cloudy told the banker he would have to have the money or his crew would quit. Finally the banker advanced $3,500.00, and had Cloudy sign a check in that sum, payable to Hills-Corbet Company and signed Craig Lumber Company, per F. A. Cloudy (See Exhibit No. 1; Transcript, p. 237).

From the first, all money disbursed by Cloudy was carried in the account of the Hills-Corbet Company. Three checks, including the one just mentioned, each in the sum of $3,500.00, were passed to the credit of Hills-Corbet Company account. After this sum was disbursed, the bank paid all overdrafts when signed by Cloudy. Out of this one banking account, Cloudy paid the bills of the Craig Lumber Company of all kinds. Some of his checks paid Hills-Corbet men, some paid Craig Lumber Company men, some paid for cook-house supplies and cook and bunk-house wages. When he drew a check to pay Hills-Corbet Company men, he marked it "on contract." When he paid the other bills unconnected with the mill, he marked them "not on contract" (Transcript, pp. 144-149). Cloudy marked all checks payable to Hills-Corbet men "on contract," regardless of whether the work

actually done was in fact extra or not. He did this because he thought Hills-Corbet Company would be entitled to ten per cent on such labor (Transcript, p. 148).

A careful addition of all checks marked "on contract" and written by Cloudy will show a total of $11,410.82. This was in payment of the total time of all Hills-Corbet men, whether expended on extra work or not. Then, to determine the amount of work done by Hills-Corbet Company under the contract, we must subtract the sum of $3,098.24, extra labor done by these men outside of the contract, and we find that the total labor cost of the work which Hills-Corbet Company undertook to perform in the contract is $8,312.58. This is the amount of labor pay roll which Craig Lumber Company is entitled to charge to Hills-Corbet Company. And the court so found (Transcript, pp. 77 and 85).

And to find out what was due and unpaid to Hills-Corbet Company, the court struck a balance as follows:

DEBITS.

Invoices under contract	$31,708.49
10% on labor	831.25
Total	$32,539.74

But contract price is limited to $32,125.00, so we must limit total debits to that sum. Add to $32,-125.00 extras in the sum of $5,958.79 and we get a total of $38,083.79 in debits.

CREDITS.

Payments	$19,943.82
Labor paid by Craig Lumber Co.	8,312.58
Total credits	$28,256.40
Balance due	$ 9,827.39

Appellants, in their brief, insist that the Craig Lumber Company has paid to Hills-Corbet Company over $39,000.00. But, in making such a contention, they entirely ignore all of the testimony in the case. They produced no testimony which even tended to contradict the testimony of F. A. Cloudy —and he carefully and fully explained his expenditures—and our statement of facts is simply a summary of what he said. His testimony—in fact all of our testimony—stands wholly uncontradicted in the record; and it is not remarkable that the court should have believed it.

The petition of Hills-Corbet Company filed in this cause prayed for an order directing the trustee to return the machinery delivered to the bankrupt and as yet unpaid for. The trustee answered, setting up a mortgage to the Bank of Alaska on

certain real estate, and claiming that the machinery delivered by us had become fixtures and that the rights of the Bank were superior to the rights of the Hills-Corbet Company. The trustee and the Bank of Alaska, the mortgagee, were anxious to sell the mill site, all buildings including the mill and machinery, and, to give good title, must dispose of this litigation. And so it was stipulated by all parties, including the Bank who appeared in this action, that the Bank should sell the machinery in litigation and should file a bond conditioned to pay the balance of the purchase-price due to Hills-Corbet Company under the contract, in case the court should hold the title of Hills-Corbet Company superior to the rights of the Bank (See stipulation, Transcript, p. 65). The stipulation requires the filing of a bond, and provides:

> "Said bond shall contain a provision that judgment thereon may be rendered by said court or courts upon the determination of the controversy herein referred to."

And a bond in the penal sum of $12,000.00 was filed, conditioned as provided for in the stipulation, and contained this clause:

> "In case the United States District Court for the Territory of Alaska, Division No. 1, or an Appellate Court on appeal or review, shall sustain the rights of Hills-Corbet Com-

> pany, judgment may be entered by said court, or courts, directly against the bond and the parties thereto for the amount found due Hills-Corbet Company as set forth above."

And so, when the court sustained the rights of the Hills-Corbet Company, judgment was entered in accordance with the stipulation and bond against the Bank of Alaska. The court declined to render judgment against the surety on the bond.

ARGUMENT.

Appellant first argues that the contract between Hills-Corbet Company and the Lumber Company is not a contract of conditional sale. The contract expressly provides:

> "The title to the apparatus and material herein agreed to be sold shall not pass from the Company until all payments hereinunder shall have been fully paid in cash. Upon default in any such payments, the Company may re-take the property agreed to be sold."

In another place it is provided:

> "The purchaser agrees to properly care for all apparatus and material delivered until the same is fully paid for."

It seems hardly necessary to cite authority to support the fundamental proposition that parties may agree as to when title shall pass, and that their agreement will be followed and enforced by the

courts. That title was retained could not be more clearly expressed:

In 24 R. C. L., Sec. 743, p. 444, it is said:

> "If the contract says in terms that it is conditional and that the goods are to remain the property of the seller until payment of the price, this stipulation is perfectly lawful; and effect will, as a general rule, be given thereto and the contract upheld as a conditional sale contract, under which no title will pass to the buyer until the condition is performed."

See *Harkness vs. Russell,* 118 U. S. 663.

In *Bailey vs. Baker Ice Machine Co.,* 239 U. S. 268, it appeared that the Ice Machine Company, by contract in writing, agreed to deliver and install for Grant Bros., at Horton, Kansas, an ice-making and refrigerating machine, to be paid partly in cash and partly in deferred installments, evidenced by interest-bearing notes. It was specially stipulated that the title to the machine should be and remain in the Baker Company until full payment of the purchase price; that Grant Bros. should keep the machine in good order and insured. The trustee in bankruptcy contended that the contract was one of absolute sale with mortgage back.

The court held the contract one of conditional sale.

In *Bierce vs. Hutchins,* 205 U. S. 340, even where vendor took notes and collateral in addition to reserving title, the contract was upheld as a conditional sale contract. The court said:

> "The contract says, in terms, that it is conditional, and that the goods are to remain the property of the seller until payment of the note given for the price. This stipulation was perfectly lawful."

Acceptance of notes for balance of purchase-price is not conclusive evidence that the sale was absolute.

Shook vs. Levi, 240 Fed. 121-123.

In *Southern Hardware & Supply Co. vs. Clark,* 201 Fed., p. 1, it was held that a contract whereby appellant delivered an automobile to the bankrupt and reserved title was a conditional sale although bankrupt was to sell with consent of appellant. There was an express retention of title by the seller until the buyer pays for the property.

> "When the buyer is, by the contract, bound to do something as a condition precedent to the passing of the title to the property, the title will not pass till the condition is fulfilled, although the property is delivered into the possession of the buyer. The buyer, in such case, acquires no property in the thing bought. He is only a bailee for a specific purpose."

The Hills-Corbet Company paid for the machinery with its own money. It gave the Lumber Company the benefit of its credit and agreed to wait for its money until the contract was finished. The Hills-Corbet Company bought the machinery in its own name. It was a contractor in every sense of the word. It guaranteed the price. It reserved the title by express agreement, and yet appellants contend that we were the mere agent of the Lumber Company, and, when we bought machinery with our own money and in our own name, the title to the property immediately vested in the Lumber Company. The argument ignores, not only the real relationship of the parties, but the express agreement between them. And to state the contention is enough to refute it.

Counsel finds some comfort in the conduct of the parties when certain fire brick were lost by the collapse of the dock. They say in their brief: "No question is raised by either party as to whose goods were lost." That is literally true. The ownership was not discussed. The Lumber Company did clearly assume the loss because its dock was defectively built. So the incident throws no light upon the question of title.

Again, it is insisted that Mr. Corbet made no objections to the Lumber Company not living up

to the terms of the contract. Appellants only quote that testimony which pleases them. Mr. Cobb, on cross-examination of Mr. Corbet, asked this question:

> "Q. Did you make any objection to their not living strictly up to the terms of the contract at that time?"
>
> "A. Yes, we certainly did."

Appellants cite *Herryford vs. Davis,* 102 U. S. 235. In that case, the contract provided for the sale to the Railway Company of certain cars and contained a stipulation that, if the purchase price of the cars was not paid, the vendor might take the property back, offer the same for sale, and, if there was any balance remaining after the payment of the purchase-price notes, it should go to the Railway Company. The court, of course, held that this contract was, in effect, a mortgage.

Appellants cite *Chicago Railway, etc., Company vs. Merchants Bank,* 136 U. S. 268. In that case, the court had for consideration the question whether certain notes given for the purchase price of railway cars were negotiable. The notes contained a provision reserving title, but also provided that they should be equally and ratably secured on said cars. The court held that the agreement con-

tained in the note was more nearly a mortgage than conditional sale because of the peculiar clause which we have mentioned.

The case of *Forsman vs. Mace,* 35 So. 372, is cited by appellants. In that case was involved a contract for the sale of a logging contract and a logging outfit for one lump price. It was conceded that there had been an out-and-out sale of the contract, and, for that reason, the court held that the title passed.

Appellants cite *Tompkins Co. vs. Monticello Cotton Oil Co.,* 137 Federal 625. In that case, the contract provided for the sale of certain machinery and included a stipulation that, if the purchase price was not paid, the vendor should take possession of the property, offer it at public or private sale, and pay any surplus resulting from such sale to the conditional vendee. There was also a provision for a deficiency judgment; and the court very correctly held that all of these provisions made the contract an equitable mortgage.

And so the court can readily see that, in all of the cases cited by appellant, there was some peculiar provision which made the court conclude that the contract, taken as a whole, constituted a mortgage. The contract involved in this case con-

tains none of the provisions which are mentioned in the cases cited by appellant, and there is nothing in the contract to indicate anything but a clear intention to reserve title and ownership until all sums due were paid.

THE RIGHTS OF THE TRUSTEE.

In the answer filed by the trustee (Transcript, p. 59), and on the trial, the rights of the Bank of Alaska under an alleged real estate mortgage were asserted, and it was alleged that the Bank took its mortgage without notice. It seems now, from the brief of appellant and from the absence of any proof of the mortgage or its foreclosure in the record, that this position has been definitely abandoned.

But the trustee insists that he is in the position of a creditor with a lien. It is conceded that, since the amendment of 1910, the trustee in bankruptcy has the rights of an attaching creditor. And yet an attaching creditor can have no rights superior to those of appellees. It has been consistently held that, since the amendment of 1910, the trustee does not hold the position of an innocent purchaser for value and without notice.

See *In re Lane Lumber Co.,* 217 Fed. 550 (9th Cir.), where the court considered the statute of

Idaho, which allows a vendor's lien for the unpaid purchase price of land except as against a purchaser or incumbrancer in good faith and for value. The court was considering the validity of a claim to an unrecorded vendor's lien as against the trustee in bankruptcy; and, referring to the amendment of 1910, said:

> "The amendment, in other words, was designed only to clothe the trustee with the right to question the validity of any lien claimed against the property of the estate, which may be defective under the law creating it, notwithstanding the bankrupt might have been estopped to do so. * * * It goes no further. It does not affect the character of the trustee's title as such. That is defined in Section 70 of the act, which clothes the trustee only 'with the title of the bankrupt as of the date he was adjudged a bankrupt.' "

And at another point the court said:

> "A creditor, 'holding a lien by legal or equitable proceedings' is not 'a purchaser or incumbrancer in good faith and for value.' * * * and, under the terms of the Idaho statute, the lien there given must give way only as to one of the latter class."

In 24 R. C. L., p. 455, it is said:

> "And, in the absence of statutory provisions to the contrary, it is generally held that the reservation of title in the seller is valid against levying creditors of the buyer, and even as against *bona fide* purchasers for value,

without notice of the buyer's want of title." See:

Note 25, L. R. A. N. S., 782.

Note 12, L. R. A., 703.

Note 1913 C. Ann. Cases, p. 330.

Sumner vs. Woods (Ala.) 42 Am. Rep. 104 and note.

Singer Mfg. Co. vs. Graham (Ore.) 34 Am. Rep. 572.

In *Pacific State Bank vs. Coats,* 205 Fed. 618, the court held a mortgage defectively acknowledged invalid as to personal property, but held it to be a valid equitable lien as to real estate except as to innocent purchasers for value. The court said:

> "That the trustee's rights were no higher than those of a creditor holding a lien by legal or equitable proceedings and were not equivalent to the rights of an innocent purchaser for value."

See also:

Zartman vs. First National Bank, 216 U. S. 134; 54 L. ed. 418.

Appellants merely suggest and do not discuss the question whether the machinery became so affixed to realty as to become fixtures. The court found

> "that all the machinery, etc., were so attached to the buildings by bolts and screws as to be

> easily moved from the said mill without damaging the building in any way whatsoever."

(Transcript, p. 75; Finding No. IX; see also testimony of Cloudy, pp. 184 to 186). So it is shown that the machinery did not become fixtures.

In *Meyer vs. Pacific Machinery Co.,* 244 Fed. 730 (9th Cir.), plaintiff sold saw-mill machinery to the Oregon City Co. and reserved title. The defendant bought the property from an assignee for the benefit of creditors. Plaintiff brought the action to recover the property. The court said:

> "But the evidence shows that the machinery is attached only by bolts and screws, that it can be removed without injury to the structure, and that it is not a fixture within the meaning of the law."

In *Whitney Central Trust, etc., Bank vs. Luck,* 231 Fed. 431, the court construed a statute which gave a lien on movable property for the unpaid purchase-price over other creditors. The court said:

> "The vendor's privilege here provided for continues to exist though the thing sold has been incorporated into a building or other immovable, if it can be detached or removed without injury to the soil or structure."

In *Lawton Pressed Brick, etc., Co. vs. Ross Kellar, etc., Co.,* (Okl) 124 Pac. 43; 49 L. R. A. N. S. 395, the plaintiff brought suit in replevin to regain

machinery installed in the mill. The defendant was a purchaser without notice of the reservation of title in the plaintiff. The court refers to the general rule that the sale and delivery of personal property on condition that the title shall remain in the vendor until the purchase price is paid does not pass title until the condition is complied with. The court said:

> "And in case the condition is not complied with, the vendor has the right to repossess himself of the goods, both against the vendee and his creditors, and, if guilty of no negligence, may recover the goods so sold, even from an innocent purchaser."

It is not seriously contended that the Craig Lumber Company could question our right to remove the machinery on the ground that the same had become attached to the realty. Under some authorities, a subsequent mortgagee, taking an interest in the real estate without notice and in good faith, might question the right to remove property which has become firmly affixed to the realty. But in this case, it appears affirmatively that the Craig Lumber Company—and therefore the trustee in bankruptcy—has never had any title to the land upon which the mill is situated. It is located upon land within a United States Forest Reservation, and the land is occupied merely under a permit

issued by the Forestry Service (see Findings of Fact No. IX; Transcript, p. 75; Testimony of Cloudy, Transcript, p. 210; Admission of Mr. Cobb and Mr. Marshall, p. 212). Having acquired no interest in the real estate, it is difficult to understand how the question of fixtures is involved. The trustee's interest in the mill and the machinery is no more than an interest or equity in personalty.

In *Detroit Steel Cooperage Co. vs. Sisterville Brewing Co.,* 233 U. S. 712; 58 L. Ed. 1166, the plaintiff sold tanks, fixtures and fittings to the defendant brewing company on conditional sale contract, reserving title in itself. It sought to enjoin the sale of the property under prior mortgage covering after-acquired property. The tanks were essential to the working of the brewery; and, after they were installed, the opening into the recess in which they stood was bricked up. The court said:

> "The common law knows no objection to what commonly is called a conditional sale."

And again:

> "But unless we give a mystic importance to bolts and screws, the mere knowledge that the chattel will be attached to the freehold is of no importance, except perhaps as against

> innocent purchasers for value before the sale was recorded, which the mortgagees were not."

In *Holt vs. Henley,* 232 U. S. 637; 58 L. Ed. 767, a petition was filed to remove an automatic sprinkler system from the premises of the bankrupt, pursuant to a contract of conditional sale reserving title. The contract had not been filed as required by the laws of Virginia. The court referred to the amendment of 1910, but declined to give it a retroactive effect, and, referring to the question of fixtures, said:

> "The system was attached to the freehold; but it could be removed without any serious harm for which complaint could be made against Holt, other than the loss of the system itself. Removal would not affect the integrity of the structure on which mortgagees advanced. To hold that the mere fact of annexing the system to the freehold overrode the agreement that it should remain personalty and still belong to Holt would be to give a mystic importance to attachment by bolts and screws."

In *Myrick vs. Liquid Carbonic Co.* (Ga.) 73 S. E.; 7-38 L. R. A.; N. S. 554, it was held that conditional vendor may recover machinery sold to bankrupt with reservation of title, although defendant has purchased the same from trustee in bankruptcy—free of liens. Property never became property of bankrupt, and trustee never acquired a title thereto. Plaintiff never asserted its title to

the property while it was in hands of trustee and never estopped itself by its conduct from so doing.

See also

Ratchford vs. Cayuga County, etc., Co. (N. Y.), 112 N. E. 447, 1916. L. R. A. 615.

Davis vs. Bliss (N. Y.) 79 N. E. 851; 10 L. R. A. N. S. 458.

Appellant cites *Washburn vs. Inter Mountain Mining Co.,* 109 Pac. 382. That case simply adheres to the principle that a party, dealing with realty after property has become a fixture and without notice of a conditional sale contract, takes a right superior to the reserved title of the conditional vendor. But, in this case, it appears affirmatively that the machinery did not become fixtures in any true sense of the term, and that there is no one who has acquired an interest in the realty subsequent to the installation of the machinery and who could be deemed an innocent purchaser without notice.

APPLICATION OF PAYMENTS.

The total cash payments made to Hills-Corbet Company were $19,943.82 (See Transcript, p. 44). Since there was a bill of extras amounting to $5,958.79, it is important to inquire how many of

these payments were or should be applied toward the payment of the extras.

First, we ascertain how many of the payments were applied by the debtor in payment of extras:

The payment of $3,812.23 made on December 17, 1917, included payment of the fares of the men to Craig, Alaska, in the sum of $477.36 (See Exhibit "E"). This was an extra (See Amended Bill of Particulars, Transcript, p. 45). The second shipment of brick, $1,614.63, was an extra. The Craig Lumber Company stood this loss, and made payment in full for same in their check for $4,461.63 (See testimony of Corbet, Transcript, p. 108). The Company paid one hundred per cent of the invoice for brick, recognizing that it was an extra. The check for $361.45, of March 5th, was in payment in full of extras shown by invoice 296 and 305 (Transcript, pp. 36 and 37), amounting to $333.00 (Exhibit "H"). So the debtor himself paid directly invoices for extras in the total sum of $2,424.99.

The last three payments made in the sum of $5,000.00 on March 18, $1,000.00 on July 19 and $1,000.00 on December 8th, were made without application by the debtor. They were simply lump-sum payments on the account of the debtor. The

Craig Lumber Company gave no directions as to application of these payments; the creditor carried all items in one account; and so it became the duty of the court to direct the manner in which these payments, amounting to $7,000.00, should be applied. And the court has followed the well-established rule of law that, where the debtor fails to make application of the payments and the creditor does not do so, then the court will apply the payments to the debt which is least secure. This rule is especially applicable here, because the amounts due under the contract were only payable in deferred installments, whereas the extras were due and payable at once.

Where the debtor has not directed the manner in which his payment should be applied and the creditor has not applied them to any particular debt, it becomes the duty of the court to apply the payments. According to the best and more numerous authorities, where there is a secured and an unsecured indebtedness, under these circumstances the court will apply the payments towards the payment of the unsecured indebtedness.

In 21 Ruling Case Law, p. 100, Sec. 107, it is said:

> "The rule that the court, in applying a general payment, should make the application

in the manner most beneficial to the debtor has not met with universal approval. On the contrary, there are a great many jurisdictions in which the doctrine prevails that the court, in applying a general payment, will do so in a manner most beneficial to the creditor * * *." In 30 Cyc. 1246, it is said:

"While in those states where the civil law rule has been adopted, the court will apply a payment to a secured rather than an unsecured debt, the general rule outside of such jurisdiction is that it will be appropriated to the unsecured indebtedness."

In *Field vs. Holland,* 6 Cranch. (U. S.) 8; 3 U. S. L. Ed. 136, the action was to set aside a sheriff's conveyance upon the ground that the judgments upon which execution issued had been satisfied. The question arose as to how certain payments by the judgment debtor should be applied, that is, whether upon the judgments or upon an unsecured indebtedness.

Chief Justice Marshall said:

"The principle, that a debtor may control, at will, the application of his payments, is not controverted. Neither is it denied, that, on his omitting to make this application, the power devolves on the creditor. If this power be exercised by neither the credtior or the debtor, it becomes the duty of the court; and in its performance, a sound discretion is to be exercised.

"It is contended by the plaintiffs, that, if the payments have been applied by neither the

creditor nor the debtor, they ought to be applied in the manner most advantageous to the debtor, because it must be presumed that such was his intention. The correctness of this conclusion cannot be conceded. When a debtor fails to avail himself of the power which he possesses, in consequence of which that power devolves on the creditor, it does not appear unreasonable to suppose that he is content with the manner in which the creditor will exercise it. If neither party avails himself of his power, in consequence of which it devolves on the court, it would seem reasonable that an equitable application should be made. It being equitable that the whole debt should be paid, it cannot be inequitable to extinguish first those debts for which the security is most precarious."

In an exhaustive note on this subject, in 96 Am. St. Rep., p. 56, it is said:

"So where one debt is secured and the other is not, or, both being secured, one is more precarious than the other, it will generally be imputed by law to the unsecured or precarious debt."

In *Bell vs. Bell* (Ala.) 56 So. 926; 37 L. R. A. N. S. 1203, the court adopted the following rule as to the application of payments:

"But if neither the debtor nor creditor expresses an election, 'the presumption of the law is that the credit is applied most beneficially to the creditor; that is, to the most precarious debt, or the one least secured.' "

The Supreme Court of Iowa, in *Cain vs. Vogt,* 116 N. W. 786, adheres to this rule of law in the following language (p. 787):

> "Indeed, where but one of the debts are secured, and payments are made of which neither the creditor nor the debtor makes application, the court, under the rule prevailing in this state, will apply it to the reduction of the unsecured claim."

In *U. S. F. & G. Co. vs. State* (Kan.) 106 Pac. 1040; 26 L. R. A. N. S. 865, the court instructed the jury, in substance, that where a debtor owes debts, some secured and some unsecured, and makes payments without specifying what debts he intends to pay, the law will apply the payments on the unsecured debts. Also that the foregoing rule took precedence over the general rule that the first credit item extinguishes the first debit item. The court, referring to this rule, said:

> "It seems to be the one applied by all courts, except in a few states, where the civil law rule has been adopted."

In *Lee vs. Manley* (N. C.) 70 S. E. 385, the court said that a debtor has the right to direct the application of a payment. If debtor does not exercise this right, the creditor may apply the payment to either debt, and he is not restricted to the time the payment is made; and the court said:

"If neither the debtor nor the creditor makes the application, the law applies to the unsecured debt."

In *Wardlaw vs. Troy Oil Mills* (S. C.) 54 S. E. 658, the court follows the same rule, and says that the general rule about applying credits to oldest items will not be followed to exclusion of first rule above mentioned.

The same rule was adopted in Vermont in *Putnam vs. Russell,* 17 Vt. 54; 42 Am. Dec. 478, where the court said:

"The court will direct the application to those debts which have the poorest security." In a note in 12 L. R. A. 712, it is said:

"The Supreme Court of the United States, in a series of well-considered decisions, has reached conclusions quite in harmony with the current of English adjudication; and, upon both principle and authority, it is held that the debtor or the party paying money, may, if he so elect, direct its appropriation; but, if he fails to give such direction, this right of appropriation devolves upon the creditor. Should he fail to apply the fund in liquidation of some particular debt, the law will make the application according to the equities of the case. It should be added that, after a litigation has arisen, neither party is at liberty to apply the payments, but the court will, in furtherance of justice, order the amount credited upon that debt for which the security is the most precarious."

In *Barbee vs. Morris* (Ill.), 77 N. E. 589, where plaintiff furnished some materials for which he could claim no lien and defendant made him a general payment without directing where it should be applied, the court held that equity will credit the payment according to its own view of the intrinsic justice and equity of the case, so as to give the creditor the best security for the debt remaining unpaid.

In *Trullinger vs. Kofoed*, 7 Oregon 228, plaintiff furnished lumber and materials used in construction of building for which he claims lien. He also furnished lumber used in construction of sidewalks. Defendant paid him $141.00, which he applied in payment of the sidewalk lumber for which he had no lien.

The court said:

> "And in case neither party had made the application, then the court could make it; and, when the court does make such application, the payment will be first applied to unsecured debts."

Rule was reaffirmed in *Union Credit Assn. vs. Corson,* (Ore.) 149 Pac. 318.

Where a party indebted to another on more than one account makes a partial payment, the

burden of proving that, at or before the time of such payment he directed its application to a particular debt, as pleaded by him, and that this direction was made known to his creditor, is upon the debtor.

See

Stone Co. vs. Rich, 75 S. E. 1077 (N. C.).

The same rule, that the court will apply payments to the debt which has the most precarious security, has been followed in the following states and courts:

Missouri:—*Mich., etc., Ins. Co. vs. Rodger,* 191 S. W. 1066.

Federal:—*Sanborn vs. Stark,* 31 Fed. 18 (Colo.).

Federal:—*The D. B. Steelman,* 48 Fed. 580 (Va.).

Federal:—*The Katie O'Neil,* 65 Fed. 111 (Judge Morrow).

Pennsylvania:—*Johnson's Appeal,* 37 Pa. St. 268.

Kentucky:—*Bell & Co. vs. Glass Works,* 50 S. W. 1092.

Kentucky:—*Burke vs. Albert,* 20 Am. Dec. 209.

Minnesota:—*Gardner vs. Leck,* 54 N. W. 746.

Minnesota:—*Lash vs. Edgerton,* 13 Minn. 210.

New Hampshire:—*Smith vs. Lewiston Mill,* 34 Atl. 153.

Massachusetts:—*Parker vs. Green,* 49 Mass. 137.

THE BOARD OF THE MEN.

Some time after the Hills-Corbet Company had finished their work, after Tromble, manager of the Craig Lumber Company, had been discharged and a man named Shattuck had taken his place, and after the Lumber Company had ceased doing business, Mr. Humfreys, a bookkeeper for the Lumber Company, entered a charge against the Hills-Corbet Company in the sum of $3,324.00 to cover board of their men. This sum was arrived at by making a mere estimate of the number of days these men boarded—made not from the time books, but only from Cloudy's check stubs—and by making a second guess as to what the cost of boarding the men had been. No record was kept by the Craig Lumber Company of the meals furnished to Hills-Corbet Company men nor of the cost of the same. Humfreys was not even present during the period when Hills-Corbet men were on the ground and didn't know whether the charge was proper in amount or at all. It was simply his own bright idea, formed long after the transaction (See Transcript, pp. 225, 223).

The fact was that Tromble, manager of the Lumber Company, told Corbet and Cloudy that the Lumber Company would stand the expense of boarding the Hills-Corbet men (Transcript, pp. 192, 179). During the time work was going on, the Lumber Company kept no record of the cost of the board or the meals served (Transcript, p. 178). And this fact shows that the Lumber Company did not intend to charge the Hills-Corbet Company with any cost for boarding the men. While Tromble, the manager who signed the contract, was in charge, no record was kept and no charge made for board. It was not until new officers had taken charge, and until six months later, that the estimate made by the bookkeeper was entered on the books.

Counsel insists that the testimony of Corbet and Cloudy that the Lumber Company agreed to stand and assume the cost of the board is an attempt to vary the written contract. But the contract itself is silent as to the board. And the conversations and conduct of the parties is competent to show the construction and meaning which they themselves put upon the contract.

THE JUDGMENT AGAINST THE BANK.

The Bank of Alaska's rights under an alleged real estate mortgage were set up in the answer of

the trustee. Later the Bank entered its general appearance in the action and expressly agreed to be bound by the final judgment. Moreover, the Bank, by its attorney, signed a stipulation that judgment against it on the bond filed might be rendered by the trial court. The bond filed by Bank provided expressly that, if the United States District Court shall sustain the rights of Hills-Corbet Company, judgment may be entered by said court directly against the bond and the parties thereto for the amount found due Hills-Corbet Company. The Bank, through its attorney, John B. Marshall, appeared at and took part in the trial of the action, cross-examining the witnesses. It comes near to bad faith now to question the right of the court to render judgment against the Bank.

The purpose of the stipulation and the bond is apparent. It permitted a sale of the property in controversy pending final judgment. Instead of depositing the proceeds of the sale in court, a bond was filed, and the Bank permitted to keep the proceeds of the sale. The Bank has invited the judgment entered and can not now complain.

CONCLUSION.

We desire to suggest, in conclusion, that the findings of fact made by the court were the result

of a patient and careful examination of the testimony offered; they are based upon uncontradicted testimony of the representatives of Hills-Corbet Company. Neither the trustee nor the Bank offered any testimony upon the real issues of the case. Their only witness, Humfrey, a bookkeeper, knew nothing about the contract, the work done under it or payments made. Therefore, the findings of the court should carry great weight with this court and should not be set aside unless palpably erroneous. For all of the foregoing reasons, the judgment should be affirmed.

Respectfully submitted,

CASSIUS E. GATES,
FRANK P. HELSELL,
NEWARK L. BURTON,

Attorneys for Appellees.

No. 3552

IN THE

United States

Circuit Court of Appeals

For the Ninth Circuit.

E. L. COBB, as Trustee of the CRAIG LUMBER CO., Bankrupt, and THE BANK OF ALASKA,

Appellants,

vs.

HILLS-CORBET COMPANY, a Corporation, Composed of F. R. HILLS and W. W. CORBET,

Appellees.

PETITION FOR REHEARING.

J. H. COBB,
Counsel for the Appellants.

United States

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Appellees.

Petition for Rehearing.

To the Honorable the Judges of the United States Circuit Court of Appeals, for the Ninth Circuit:

We have examined with care the opinion of this Court handed down the 3d day of January, 1921, and it appears that the Court has overlooked two points raised in the assignments of error and discussed in the briefs. If the Court did in fact overlook these, it was no doubt due to the inadequate brief filed in behalf of the appellants. We feel con-

strained, therefore, to petition the Court for rehearing and a reconsideration of the following two points:

1. Whether or not under the statutes of Alaska a conditional sale not executed and recorded as required by said statutes can be enforced against a trustee in bankruptcy.

2. Whether or not under the terms of the conditional sale the board of the employees of the Hills-Corbet Co. was a part of the cost of labor to be paid by them.

If the first point should be decided in favor of the appellants it is conclusion of the whole case. If the second point is sustained it materially reduces the amount of the judgment.

The statutes of Alaska bearing upon and which we conceive control the matter, read as follows:

> "Sec. 740. A mortgage of personal property is void as against creditors of the mortgagor and subsequent purchasers and incumbrancers of the property in good faith for value, unless—
>
> (1) The possession of such property be delivered to and retained by the mortgagee; or
>
> (2) The mortgage provides that the property may remain in the possession of the mortgagor and be accompanied by an affidavit of all the parties thereto, or, in case any party is absent from the precinct where such mortgage is executed, at the time of the execution thereof, an affidavit of those present and of the agent or attorney in fact of such absent party that the same is made in good faith to secure the amount named

therein, and without any design to hinder, delay, or defraud creditors, and be acknowledged and filed as hereinafter provided."

"Sec. 743. Every mortgage of personal property, together with the affidavits of the parties thereto or a copy thereof, certified to be correct by the person before whom the acknowledgment has been made, must be filed in the office of the recorder of the precinct where the mortgagor resides, and of the precinct where the property is at the time of the execution of the mortgage, or, in case he is not a resident of the district, then in the office of the recorder of the precinct where the property is at the time of the execution of the mortgage; and the recorder must, on receipt of such mortgage or copy, indorse thereon the time of receiving the same, and file and keep the same in his office ruled and kept for that purpose, the names of all the parties—the names of the mortgagors to be alphabetically arranged—the consideration thereof, the date of its maturity, and the time of filing the same."

"Sec. 744. Every mortgage filed as provided in this chapter shall be void as against the creditors of the person making the same, or against subsequent purchasers or mortgagees in good faith, after the expiration of one year from the filing thereof, unless within thirty days next preceding the expiration of the term of one year a true copy of such mortgage, with a verified statement exhibiting the interest of the mortgagee in the property at the time the same is renewed, as

claimed by virtue of such mortgage, is again filed in the office where the original was filed; and the effect of such renewal shall be to extend the lien of the mortgage as against the creditors, purchasers, and incumbrancers of the property for the further term of one year."

"Sec. 748. The provisions of the foregoing sections of this chapter shall extend to all such bills of sale, deeds of trust, and other conveyances of goods, chattels, or personal property as shall have the effect of a mortgage or lien upon such property."

Compiled Laws of Alaska.

The conditional sale contract in this case (Record, 5–9) was not executed as required by said statutes nor recorded. As a chattel mortgage it was clearly void both as against the trustee in bankruptcy and the bank. Does section 748, *supra,* require that conditional sales to be valid in Alaska shall be executed in like manner? We think it does. The requirements of sections 740, 743 and 744 are by section 748 extended "to all such bills of sale, deeds of trust and other conveyances of goods, chattels or personal property as shall have the effect of a mortgage or lien upon such property." By the decision of the lower court and this court, the application of payments was made first as to the extras furnished by the Hills-Corbet Co., on the ground that it was not inequitable "to extinguish first those debts of which the security is most precarious." In short, in the conditional sale involved in this case, the Craig Lumber Company was in effect a mortgagor in possession, and the Court

will observe that the statute strikes down such instruments when not executed and recorded in accordance with the law against creditors with or without notice. They are only saved as to subsequent purchasers or mortgagors with notice.

The other point not decided by the Court relates to the action of the lower court in charging the Craig Lumber Co. with the sum of $3,324.00, the cost of boarding the employees of the Hills-Corbet Co., while they were working under the contract. Under the terms of the contract the entire cost of the labor, except the transportation from Seattle, Washington, to Craig, Alaska, was to be borne in the first instance by the Hills-Corbet Co. (Record, pp. 7, 8), and that cost added to all other costs in fulfilling the contract was not to exceed $32,125.00. Now, it is beyond question from the record that this sum of $3,324.00 board of the Hills-Corbet Co. employees was paid directly by the Craig Lumber Company and the amount due the Hills-Corbet Co. should be reduced by that amount unless the Court was right in permitting W. W. Corbet to testify that in a conversation with the president of the Craig Lumber Co., the terms of this written contract were varied by the assumption of the Craig Lumber Company to stand for the board of the men. Even if that could be done in any case, it was error to allow it here because no such variation of the contract was plead. The appellees relied in their petition upon the written contract under which, as recognized by them, they were liable for the board of the men. Without any pleading to put appellants upon notice of any such purpose they were permitted at the trial to testify to

another and different contract, and without any opportunity for appellants to contradict said testimony by F. J. Tromble if they could.

Respectfully submitted,

J. H. COBB,

Counsel for the Appellants.

I hereby certify that I am one of the counsel for appellants and that in my opinion the above and foregoing Petition for Rehearing is well founded in point of law and fact and is not interposed for delay.

J. H. COBB,

Counsel for Petitioners and Appellants.

No. 3577

United States

Circuit Court of Appeals

For the Ninth Circuit.

MON SINGH, Sometimes Referred to as MAN SINGH,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration, Port of San Francisco,

Appellee.

Transcript of Record.

Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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For Respondent and Appellee:

UNITED STATES ATTORNEY, San Francisco, Calif.

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,738.

In the Matter of MON SINGH, Sometimes Referred to as MAN SINGH, on Habeas Corpus.

Praecipe for Transcript on Appeal.

To the Clerk of said Court:

Sir: Please make up Transcript on Appeal in the above-entitled case, to be composed of the following papers, to wit:

1. Petition for writ of habeas corpus.
2. Order to show cause.
3. Demurrer to petition.
4. Judgment and order sustaining demurrer and denying petition, including memorandum opinion of the Court.
5. Notice of appeal.
6. Petition for appeal.
7. Assignment of errors.

8. Order allowing petition for appeal.
9. Stipulation and order regarding withdrawal and filing original immigration record in Appellate Court.
10. Minute order and stipulation upon original filing of immigration record.
11. Citation on appeal, original and copy.
12. Clerk's certificate.

Respectfully,
GEO. A. McGOWAN,
Attorney for Petitioner and Appellant Herein.

[Endorsed]: Filed Sep. 2, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [1*]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,738.

In the Matter of the Application of MON SINGH, Sometimes Referred to as MAN SINGH, on Habeas Corpus.

Petition for Writ of Habeas Corpus.

To the Honorable United States District Judge Now Presiding in the Above-entitled Court:

It is respectfully shown by the petition of the undersigned,—

That Mon Singh, sometimes referred to as Man Singh, hereinafter referred to as the detained, is

*Page-number appearing at foot of page of original certified Transcript of Record.

unlawfully imprisoned, detained, confined and restrained of his liberty by and under the order of and by the direction of the Secretary of Labor by Edward White, Commissioner of Immigration for the Port and District of San Francisco, at the Immigration Station at Angel Island, County of Marin, within the State and Northern District of California, Southern Division thereof, and within the jurisdiction of this Court. That the said imprisonment, detention, confinement and restraint are illegal, and that the illegality thereof consists in this, to wit:

That is is claimed by the said Secretary and the said Commissioner that the detained is an alien person who has been found within the United States in violation of the Act of Congress of the United States of February 5th, 1917, entitled an Act Regulating Immigration of Aliens to, and Residence of Aliens in, the United States, and that the said detained is therefore subject to be taken into custody and returned to the country whence he came. That [2] the said Commissioner now holds the said detained in his custody under a warrant of deportation issued by the said Secretary of Labor upon the 21st of January, 1918, and it is the purpose and intention of the said Commissioner to execute the said warrant of deportation by causing the said detained to be deported on the steamer "Nanking," sailing from the port of San Francisco at 1 o'clock P. M. on December 10th, 1919; and unless this Court intervene, the said detained will be carried away from his domicile within the United

States and deprived of his rights all as in this petition hereinafter expressly set forth.

Your petitioner alleges upon his information and belief that the said detained originally entered the United States at the port of San Francisco, State of California, on or about the 14th or the 15th day of April, 1910, he having arrived thereat upon the S. S. "Manchuria," and that the said detained has continuously since said time resided within the United States and has not departed therefrom, and that he enjoyed an unbroken and continuous residence within the United States of upwards of seven years prior to the issuance of the warrant of arrest or the succeeding warrant of deportation by the Secretary of Labor, and that for said reason the said Secretary of Labor was without authority or jurisdiction to issue either a warrant of arrest or a warrant of deportation against this detained.

Your petitioner further alleges upon his information and belief that it is charged against the said detained that he entered the United States from Mexico, near Calexico, California, without inspection on or about the first day of November, 1915, or the seventh day of November, 1915, and that at the time of said entry he was a person likely to become a public charge, and your petitioner alleges that a warrant of arrest was issued by the [3] Secretary of Labor under the terms and provisions of the Act of Congress of February 20th, 1907, which said warrant of arrest and the proceedings thereby initiated were pending at the time of the taking effect of the Act of Congress of February

5th, 1917, which said Act is known as the General Immigration Law, and that under the terms and provisions of the said last-mentioned Act, and particularly under the concluding provision of Section 38 thereof which is as follows:

> "PROVIDED, FURTHER, That nothing contained in this act shall be construed to affect any prosecution, suit, action or proceedings brought, or any act, thing or matter, civil or criminal done or existing at the time of the taking effect of this act, except as mentioned in the third proviso of section nineteen hereof; but as to all such prosecutions, suits, actions, proceedings, acts, things or matters, the laws or parts of laws repealed or amended by this act are hereby continued in force and effect."

the said Secretary of Labor was without statutory authority to proceed against the said detained excepting under the terms and provisions of the said earlier Immigration Act of February 20th, 1907.

And your petitioner further alleges that the said Secretary exceeded his statutory authority and acted in violation thereof, when he caused to be issued against the said detained a warrant of arrest and conducted a proceeding thereunder, and finally issued a warrant of deportation therein against the said detained under the terms and provisions of the said Act of Congress of February 5th, 1917, which your petitioner alleges was plainly in excess of and in violation of the statutory authority conferred upon the said Secretary in said matters made and provided.

Your petitioner further alleges upon his information and belief that the charge contained in the said warrant that there was a likelihood of the said detained becoming a public charge at the time he entered the United States is a finding which, according to the information and belief of your petitioner, is an abuse of the discretion conferred upon the Secretary in such [4] matters in this, that the said detained has resided in the United States for almost ten years last past, and that he never upon any occasion or at any time during said period has been or become a public charge, or is there any likelihood of his being or becoming a public charge, but, on the contrary, the said detained has during all of said time been a healthy, able-bodied man, engaged in useful and laboring occupations, tending to the development of the agricultural resources of the United States, and your petitioner further alleges upon his information and belief that the said Secretary has made a mistake in interpretation of the said statute in this that he has contended that if there is, in his judgment or opinion, a likelihood of the detained at some future time being *arrest* or involved in some transgression of the law, that he then and in that event may conclude therefrom that the said detained is likely to become a public charge. Your petitioner alleges that the said construction of the said statute by the said Secretary, and the meaning placed thereon by the said Secretary is outside of the true meaning of the said statute, and hence is a violation of the discretion committed to the said Secretary and is in

excess of the statutory authority conferred upon him.

Your petitioner further alleges upon his information and belief that the charge contained in the said warrant that the said detained had entered without inspection is a finding which, according to the information and belief of your petitioner is an abuse of discretion conferred upon the Secretary in such matters, in this, that the said detained has resided in the United States for almost ten years last past, and that he has never, upon any occasion, or at any time during said period, been out of the territorial limits of the mainland territory of the United [5] States, and your petitioner alleges upon his information and belief that there is, as a matter of law, no legal or competent testimony supporting the said allegation in the said warrant which truly or at all establishes the fact that this said detained ever left the United States, or that he entered or re-entered it as specified in said warrant. That there is no legal, proper or other evidence which, as a matter of law, sufficiently identifies the said detained as the person referred to in part of the evidence taken and entertained and received by the said Secretary, and therefore your petitioner alleges upon his information and belief that the finding and conclusion of the said Secretary that the said detained had entered the United States on or about the first or seventh day of November, 1915, was without any competent, proper or legal evidence to support it, and is a finding which is there-

fore null and void and in excess of the power of the said Secretary to make.

Your petitioner further alleges upon his information and belief that the said Secretary is without statutory power or authority to cause the detained to be deported away from and out of the United States in this, that the power and authority of the said Secretary is limited to three years after the entry of the said detained, and that the deportation must be effected within said time. Your petitioner alleges that the said period of three years having long since passed and expired without the deportation having been effected, that the said Secretary is without statutory power or warrant in the premises.

Your petitioner further alleges upon his information and belief that a former application for a petition for a writ of habeas corpus was presented to the above-entitled court, but that the points herein raised attesting the statutory authority of the said Secretary were not therein presented, and are now therefore [6] being urged before this Court in this proceeding for the first time.

That your petitioner has not in his possession a copy of the record of the proceedings and the evidence taken at the said hearing had before the said Secretary, and cannot, for said reason, submit a copy thereof with this petition, but your petitioner stipulates that upon the production of the original immigration record by the immigration authorities, that the same may be submitted in evidence and deemed a part and parcel of the petition herein.

That the said detained is now in custody at the Immigration Station at Angel Island, having just been surrendered into custody in pursuance of the request which had just previously been communicated to him; and that it is therefore impossible for the said detained to verify the said petition on his own behalf, but your petitioner does at the special instance and request of the detained and as the act of the said detained, so verify this petition as his next friend.

Your petitioner further alleges that during the continuance of the entire executive deportation proceedings hereinabove referred to, the said detained was released upon bail by the immigration authorities of the United States in the sum of $2,000, and that he has been, at the request of the said immigration authorities, surrendered into custody the 6th day of December, 1919.

WHEREFORE, your petitioner prays that a writ of habeas corpus issue herein as prayed for, directed to the said Commissioner, commanding him to have the body of the said detained, together with the time and cause of his detention, before your Honor at a time and place to be therein specified, to the end that the cause of the detention of the said detained may be inquired into, and that he may be discharged from custody and go hence without day; and your petitioner further prays that during the pendency of the said matter the said detained may be released in bond in the sum of [7] $2,000, as he had been so previously released

before the immigration authorities as hereinbefore set forth.

CHARN SINGH SODHER.

GEO. A. McGOWAN,

Attorney for Petitioner, Bank of Italy Building, 550 Montgomery Street, San Francisco, Cal. [8]

United States of America,
State and Northern District of California,
City and County of San Francisco,—ss.

The undersigned being first duly sworn, deposes and says:

That he is the petitioner named in the foregoing petition; that the same has been read and explained to him, and that he knows the contents thereof; that the same is true of his own knowledge except as to those matters which are therein stated on his information and belief, and as to those matters he believes it to be true.

CHARN SINGH SODHER.

Subscribed and sworn to before me this 8th day of December, 1919.

HARRY L. HORN, [Seal]

Notary Public, in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Dec. 9, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [9]

In the District Court of the United States, for the Northern District of California, Southern Division, First Division.

No. 16,738.

In the Matter of the Application of MON SINGH, Sometimes Referred to as MAN SINGH, on Habeas Corpus.

Order to Show Cause.

Good cause appearing therefor, and upon reading the verified petition for a writ of habeas corpus on file herein, it is hereby ordered that Edward White, Commissioner of Immigration for the Port and District of San Francisco, appear before this Court on the 13th day of December, A. D. 1919, at the hour of 10 o'clock of said day, to show cause, if any he has, why a writ of habeas corpus should not be issued as prayed for; and that a copy of this order be served upon the said Commissioner, and a copy of said petition upon the United States Attorney for this District.

It is further ordered that the said Edward White, Commissioner of Immigration as aforesaid, or whoever, acting under the orders of the said Commissioner, or of the Secretary of Labor, shall have the custody of the said Mon Singh, sometimes referred to as Man Singh, are hereby ordered and directed to retain the said person within the custody of the said Commissioner of Immigration and within the jurisdiction of this Court until its further and until its final order herein.

Dated, San Francisco, California, 9th day of December, A. D. 1919.

FRANK H. RUDKIN,
U. S. District Judge.

[Endorsed]: Filed Dec. 9, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [10]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,738.

In the Matter of the Application of MON SINGH, Sometimes Referred to as MAN SINGH, on Habeas Corpus.

Demurrer to Petition for Writ of Habeas Corpus.

Now comes the respondent, Edward White, Commissioner of Immigration, at the port of San Francisco, in the Southern Division of the Northern District of California, and demurs to the petition for a writ of habeas corpus in the above-entitled cause, and for grounds of demurrer alleges:

I.

That the said petition does not state facts sufficient to entitle petitioner to the issuance of a writ of habeas corpus, or for any relief thereon.

II.

That said petition is insufficient in that the statements therein relative to the record of the testimony taken on the trial of the said applicant are

conclusions of law and not statements of the ultimate facts.

WHEREFORE, respondent prays that the writ of habeas corpus be denied.

ANNETTE ABBOTT ADAMS,
United States Attorney,
BEN F. GEIS,
Asst. United States Attorney,
Attorneys for Respondent.

[Endorsed]: Filed Dec. 19, 1919. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [11]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Saturday, the thirty-first day of January, in the year of our Lord, one thousand nine hundred and twenty. PRESENT: The Honorable FRANK H. RUDKIN, District Judge.

No. 16,738.

In the Matter of MON SINGH, on Habeas Corpus.

Minutes of Court—January 31, 1920—Order Submitting Case.

This matter came on regularly this day for hearing on order to show cause and demurrer to petition. After hearing the respective attorneys herein, the Court ordered that said matter be submitted

on records and points and authorities to be filed by petitioner in five (5) days. [12]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the city and county of San Francisco, State of California, on Tuesday, the tenth day of February, in the year of our Lord one thousand nine hundred and twenty. PRESENT: The Honorable FRANK H. RUDKIN, Judge.

No. 16,738.

In the Matter of MON SINGH, on Habeas Corpus.

Minutes of Court—February 10, 1920—Order Sustaining Demurrer, etc.

Pursuant to opinion this day filed, it is ordered that the demurrer to the petition for a writ of habeas corpus herein be and the same is hereby sustained and the said petition be and the same is hereby dismissed. [13]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,738.

In the Matter of MON SINGH, Sometimes Referred to as MAN SINGH, on Habeas Corpus.

ORDER SUSTAINING DEMURRER TO PETITION FOR WRIT OF HABEAS CORPUS.

GEORGE A. McGOWAN, Esq., Attorney for Petitioner.

ANNETTE ABBOTT ADAMS, United States Attorney, and BEN. F. GEIS, Esq., Assistant United States Attorney, Attorneys for Respondent.

Memorandum.

RUDKIN, District Judge.

On the 21st day of January, 1918, the Assistant Secretary of Labor issued his warrant, reciting that the petitioner had been found in the United States in violation of the Immigration Act of February 5, 1917, to wit: "That he was a person likely to become a public charge at the time of his entry into the United States; and that he entered the United States by land at a place other than a designated port of entry for aliens," and directing that he be deported and returned to India, the country whence he came. The petitioner has filed an application for a writ of habeas corpus claiming that the hear-

ing awarded him by the Department was unfair and raising other questions which will be referred to presently. The finding of the Department that the petitioner entered the United States in the year 1915 from the Republic of Mexico by land at a place other than one designated as a port of entry is supported by competent testimony and beyond this the Court is not at liberty to review that finding. In determining the character of the entry it matters little whether we look to the act of February 20, 1907, [14] or to the act of February 5, 1917, because the provisions of the two acts are substantially the same. See section 36 of the act of 1907 and section 19 of the act of 1917. And if the petitioner entered the United States unlawfully, it matters little whether he is deported under the act of 1917 or the act of 1907, because the procedure for the deportation is the same under both acts. The demurrer will therefore be sustained and the petition dismissed. Let an order be entered accordingly.

February 10th, 1920.

[Endorsed]: Feb. 10, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [15]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,738.

In the Matter of MON SINGH, Sometimes Referred to as MAN SINGH, on Habeas Corpus.

Notice of Appeal.

To the Clerk of the Above-entitled Court, and to ANNETTE ABBOTT ADAMS, United States Attorney, and BEN. F. GEIS, Assistant United States Attorney for the Northern District of California:

You and each of you will please take notice that Mon Singh, sometimes referred to as Man Singh, the detained and petitioner herein, does hereby appeal to the Circuit Court of Appeals of the United States for the Ninth Circuit from the order and judgment made and entered herein on the 10th day of February, 1920, sustaining the demurrer, and denying the petition for a writ of habeas corpus filed herein and dismissing the same.

Dated, San Francisco, California, February 21st, 1920.

GEO. A. McGOWAN,

Attorney for Petitioner, Detained and Appellant Herein. [16]

In the Southern Division of the United States District Court, for the Northern District of California, First Division.

No. 16,738.

In the Matter of MON SINGH, Sometimes Referred to as MAN SINGH, on Habeas Corpus.

Petition for Appeal.

Comes now Mon Singh, sometimes referred to as Man Singh, the detained and petitioner, who is the appellant herein, and says:

That on the 10th day of February, 1920, the above-entitled Court made and entered its order and judgment herein, sustaining the demurrer and denying the petition for a writ of habeas corpus filed herein and dismissing the same, in which said order and judgment certain errors are made to the prejudice of the appellant herein, all of which will more fully appear from the assignment of errors filed herein.

Wherefore, this appellant prays that an appeal may be granted in his behalf to the Circuit Court of Appeals of the United States for the Ninth Circuit for a correction of the errors so complained of, and further that a transcript of the record, proceedings and papers in the above-entitled cause as shown by the praecipe, duly authenticated, may be sent and transmitted to the said United States Circuit Court of Appeals for the Ninth Circuit.

It is further prayed that during the pendency of the said appeal that the said Mon Singh, sometimes referred to as Man Singh, may retain his liberty and remain at large under the order heretofore made herein, provided that he remain within the State of California, and render himself in execution of whatever judgment [17] is finally entered herein.

Dated: San Francisco, California, February 21st, 1920.

GEO A. McGOWAN,

Attorney for Petitioner, Detained and Appellant Herein. [18]

In the District Court of the United States, in and for the Northern District of California, Southern Division, First Division.

No. 16,738.

In the Matter of MON SINGH, Sometimes Referred to as MAN SINGH, on Habeas Corpus.

Assignment of Errors.

Comes now Mon Singh, sometimes referred to as Man Singh, the detained and petitioner herein, and appellant herein, by his attorney, George A. McGowan, Esquire, in connection with his petition for a hearing herein, and assigns the following errors which he avers occurred upon the trial or hearing of the above-entitled cause, and upon which he will

rely upon appeal to the Circuit Court of Appeals for the Ninth Circuit, to wit:

FIRST: That the Court erred in denying the petition for a writ of habeas corpus herein.

SECOND: That the Court erred in not holding that it had jurisdiction to issue a writ of habeas corpus, as prayed for in the petition herein.

THIRD: That the Court erred in not holding that the allegations contained in the petition herein for a writ of habeas corpus were sufficient in law to justify the granting and issuing of a writ of habeas corpus, as prayed for in the said petition.

FOURTH: That the Court erred in holding that there was sufficient or any evidence submitted before the Secretary of Labor to show that there was a likelihood of the petitioner and appellant, Mon Singh, sometimes referred to as Man Singh, becoming a public charge at the time of his entry into the United States within the meaning and as the said term is used in the general immigration law. [19]

FIFTH: That the Court erred in holding that there was sufficient or any evidence submitted before the Secretary of Labor to show that the petitioner and appellant, Mon Singh, sometimes referred to as Man Singh, entered the United States by land at a place other than a designated port of entry for aliens.

SIXTH: That the Court erred in holding that the Secretary of Labor had jurisdiction to deport for a violation of the General Immigration Act of February 20th, 1907, under the authority conferred

upon him by the General Immigration Law of February 5th, 1917.

WHEREFORE, the appellant prays that the judgment and order of the United States District Court, in and for the Northern District of the State of California, Southern Division, Division No. 1, made and entered herein, in the office of the Clerk of said Court on the 10th day of February, 1920, sustaining the demurrer and denying the petition for a writ of habeas corpus filed herein and dismissing the same be reversed, and that this cause be remitted to the said lower Court with instructions to discharge the said Mon Singh, sometimes referred to as Man Singh, from custody, or grant him a new trial before the lower court, by directing the issuance of a writ of habeas corpus, as prayed for in the said petition.

Dated: San Francisco, California, February 21st, 1920.

GEO. A. McGOWAN,
Attorney for Appellant.

Service of the within notice of appeal, petition for the allowance of an appeal and assignment of errors, together with the receipt of a copy of each thereof, is hereby admitted this 21st day of February, 1920.

ANNETTE ABBOTT ADAMS,
United States Attorney, the Attorney for Respondent Herein.

[Endorsed]: Filed Feb. 21, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [20]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,738.

In the Matter of MON SINGH, Sometimes Referred to as MAN SINGH, on Habeas Corpus.

Order Allowing Petition for Appeal.

On this 21st day of February, 1920, comes Mon Singh, sometimes referred to as Man Singh, the detained and petitioner herein, and appellant herein, by his attorney, George A. McGowan, Esquire, and having previously filed herein, did present to this Court his petition praying for the allowance of an appeal to the United States Circuit Court of Appeals for the Ninth Circuit, from the order and judgment made and entered herein on the 10th day of February, 1920, sustaining the demurrer, and denying the petition for a writ of habeas corpus filed herein and dismissing the same, intended to be urged and prosecuted by him, and praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had in the premises as may seem proper.

IN CONSIDERATION WHEREOF, this Honorable Court does hereby allow the appeal herein

prayed for, and orders and directs that the execution of the warrant of deportation made by the Secretary of Labor be stayed pending a hearing of the said case in the United States Circuit Court of Appeals for the Ninth Circuit, and it is further ordered that the said Mon Singh, sometimes referred to as Man Singh, may retain his liberty and remain at large under the order [21] heretofore made herein, provided that he remain within the State of California and render himself in execution of whatever judgment is finally entered herein.

Dated: San Francisco, Cal., February 21st, 1920.

FRANK H. RUDKIN,
United States District Judge.

Service of the within order allowing appeal herein and receipt of a copy thereof is hereby admitted this 21st day of February, 1920.

ANNETTE ABBOTT ADAMS,
United States Attorney, the Attorney for the Respondent Herein.

[Endorsed]: Filed Feb. 21, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [22]

Citation on Appeal (Copy).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco, and to F. M. SILVA, His Attorney, GREETING:

You are hereby cited and admonished to be and

appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the Southern Division United States District Court for the Northern District of California, wherein Mon Singh, sometimes referred to as Man Singh, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, any why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. H. SAWTELLE, United States District Judge sitting by assignment in the Northern District of California this 7th day of August, A. D. 1920.

WM. H. SAWTELLE,
United States District Judge.

Service of the within citation on appeal and receipt of a copy thereof is hereby admitted this 7th day of August, 1920.

FRANK M. SILVA,
United States Attorney.

Acknowledgment is hereby made that a copy of the within citation on appeal has been this day lodged with this office.

W. B. MALING,
Clerk U. S. District Court, Northern District of Cal.

By C. W. Calbreath.
Deputy.

[Endorsed]: Filed Aug. 7, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk. [23]

At a stated term of the District Court of the United States, for the Northern District of California, First Division, held at the courtroom thereof, in the City and County of San Francisco, State of California, on Saturday, the 25th day of September, in the year of our Lord one thousand nine hundred and twenty. PRESENT: The Honorable MAURICE T. DOOLING, Judge.

No. 16,738.

In the Matter of MON SINGH, Sometimes Known as MAN SINGH, on Habeas Corpus.

Minutes of Court—September 25, 1920—Order Regarding Filing of Immigration Record.

On motion of Geo. A. McGOWAN, Esquire, attorney for petitioner and detained herein, and upon his presenting the Immigration Record in connection with the detained herein, it is ordered that the same be filed *nunc pro tunc* as of January 31st, 1920, and that the same be considered as a part of the original petition on file herein. [24]

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,738.

In the Matter of MON SINGH, Sometimes Referred to as MAN SINGH, on Habeas Corpus.

Stipulation and Order Respecting Withdrawal of Immigration Record.

IT IS HEREBY STIPULATED AND AGREED by and between the attorney for the petition and appellant and the attorney for the respondent and appellee herein, that the original Immigration Record in evidence and considered as part and parcel of the petition for a writ of habeas corpus upon the hearing of the demurrer may be withdrawn from the files of the clerk of this court and filed with the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, there to be considered as part and parcel of the record on appeal in the above-entitled case with the same force and effect as if embodied in the transcript of the record and so certified to by the clerk of this court.

Dated: San Francisco, Cal., September 2d, 1920.

GEO. A. McGOWAN,
Attorney for Petitioner and Appellant.

FRANK M. SILVA,
United States Attorney,
Attorney for Respondent and Appellee.

ORDER.

Upon reading and filing the foregoing stipulation, it is hereby ordered that the said immigration record therein referred to may be withdrawn from the files of the clerk of this court, and filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit, said withdrawal to be made at the time the record on appeal herein is certified to by the [25] clerk of this court and transmitted to the clerk of the said Appellate Court.

Dated: September 2d, 1920.

M. T. DOOLING,
U. S. District Judge.

[Endorsed]: Filed Sep. 2, 1920. W. B. Maling, Clerk. By C. M. Taylor, Deputy Clerk. [26]

Certificate of Clerk U. S. District Court to Transcript on Appeal.

I, Walter B. Maling, Clerk of the District Court of the United States, for the Northern District of California, do hereby certify that the foregoing 26 pages, numbered from 1 to 26, inclusive, contain a full, true, and correct transcript of certain records and proceedings, in the Matter of Mon Singh, etc., on Habeas Corpus, No. 16,738, as the same now remain on file and of record in this office; said transcript having been prepared pursuant to and in accordance with the praecipe for transcript on appeal (copy of which is embodied herein), and the

instructions of the attorney for petitioner and appellant herein.

I further certify that the cost for preparing and certifying the foregoing transcript on appeal is the sum of eight dollars and twenty cents ($8.20), and that the same has been paid to me by the attorney for petitioner herein.

Annexed hereto is the original citation on appeal issued herein (page 28).

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court, this 27th day of September, A. D. 1920.

[Seal] WALTER B. MALING,
Clerk.
By C. M. Taylor,
Deputy Clerk. [27]

Citation on Appeal (Original).

UNITED STATES OF AMERICA,—ss.

The President of the United States, to EDWARD WHITE, Commissioner of Immigration, Port of San Francisco, and to F. M. SILVA, His Attorney, GREETING:

You are hereby cited and admonished to be and appear at a United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, in the State of California, within thirty days from the date hereof, pursuant to an order allowing an appeal, of record in the clerk's office of the Southern Division, United States District Court, for the Northern District of California,

wherein Mon Singh, sometimes referred to as Man Singh, is appellant, and you are appellee, to show cause, if any there be, why the decree rendered against the said appellant, as in the said order allowing appeal mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

WITNESS, the Honorable WM. H. SAWTELLE, United States District Judge, sitting by assignment in the Northern District of California, this 7th day of August, A. D. 1920.

WM. H. SAWTELLE,
United States District Judge. [28]

Service of the within citation on appeal and receipt of a copy thereof is hereby admitted this 7th day of August, 1920.

FRANK M. SILVA,
United States Attorney.

Acknowledgment is hereby made that a copy of the within citation on appeal has been this day lodged with this office.

Dated: August —, 1920.

W. B. MALING,
Clerk U. S. District Court, Northern District of Cal.

By C. W. Calbreath,
Deputy.

[Endorsed]: No. 16,738. United States District Court for the Northern District of California, Southern Division. Mon Singh, Sometimes Referred to as Man Singh, Appellant, vs. Edward

White, Commissioner of Immigration, Port of S. F. Citation on Appeal. Filed Aug. 7, 1920. W. B. Maling, Clerk. By C. W. Calbreath, Deputy Clerk.

[Endorsed]: No. 3577. United States Circuit Court of Appeals for the Ninth Circuit. Mon Singh, Sometimes Referred to as Man Singh, Appellant, vs. Edward White, as Commissioner of Immigration, Port of San Francisco, Appellee. Transcript of Record. Upon Appeal from the Southern Division of the United States District Court for the Northern District of California, First Division.

Filed September 27, 1920.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

In the Southern Division of the United States District Court for the Northern District of California, First Division.

No. 16,738.

In the Matter of MON SINGH, Sometimes Referred to as MAN SINGH, on Habeas Corpus.

Order Extending Time Thirty Days from September 2, 1920, to File Record and Docket Cause.

Good cause appearing therefor, and upon motion

of Geo. A. McGowan, Esq., attorney for the petitioner and appellant herein,—

IT IS HEREBY ORDERED that the time within which the above-entitled case may be docketed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit may be and the same hereby is extended for a period of thirty (30) days from and after the date hereof.

Dated, San Francisco, Cal., September 2, A. D. 1920.

W. H. HUNT,

Judge of the United States Circuit Court of Appeals for the Ninth Circuit.

Service of the within order and receipt of a copy thereof is hereby admitted this 2d day of Sept., 1920.

FRANK M. SILVA,

U. S. Atty.

[Endorsed]: No. 16,738. In the Southern Division of the United States District Court for the Northern District of California, First Division. In the Matter of Mon Singh, Sometimes Referred to as Man Singh, on Habeas Corpus. Order Extending Time to Docket Case.

No. 3577. United States Circuit Court of Appeals for the Ninth Circuit. Filed Sep. 2, 1920. F. D. Monckton, Clerk. Refiled Sep. 27, 1920. F. D. Monckton, Clerk.

No. 3577

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MON SINGH, sometimes referred to as MAN SINGH,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,

Appellee.

APPELLEE'S REPLY BRIEF

FRANK M. SILVA,
United States Attorney,

BEN F. GEIS,
Assistant U. S. Attorney.
Attorneys for Appellee.

Neal, Stratford & Kerr, S. F. 12256

No. 3577

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MON SINGH, sometimes referred to as MAN SINGH,
Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration for the Port of San Francisco,
Appellee.

APPELLEE'S REPLY BRIEF

STATEMENT OF THE CASE.

Man Singh, the appellant herein, was arrested on a warrant issued by the Secretary of Labor dated September 18, 1917, charging "that he was a person likely to become a public charge at the time of his entry into the United States, and that he entered without inspection," on or about the 1st day of November, 1915. (Exhibit A, page 38).

He was given hearings under said warrant (Exhibit A, pages 79-50) at which hearings he was at all times represented by counsel, who filed a brief on his behalf. (Exhibit A, page 95). After a careful review of the evidence (Exhibit A, pages 104-99) the

Secretary of Labor issued a warrant of deportation (Exhibit A, page 108) dated January 21, 1918, in which he found from proofs submitted to him that said Man Singh entered the United States near the Port of Calexico, California, on or about the 1st day of November, 1915, and has been found in the United States in violation of the Immigration Act of February 5, 1917, to wit:

> "That he was a person likely to become a public charge at the time of his entry into the United States; and that he entered the United States by land at a place other than a designated port of entry for aliens."

Thereafter, to wit, April 5, 1918, said Man Singh was delivered into the custody of Edward White, Commissioner of Immigration at the Port of San Francisco, for deportation pursuant to said warrant.

Thereafter, on April 5, 1918, a petition for writ of habeas corpus, No. 16365, was filed in the Southern Division of the United States District Court for the Northern District of California, First Division, to which a demurrer was interposed and filed on April 27, 1918, and on September 19, 1918, an order sustaining said demurrer and denying the writ was filed therein.

Thereafter, to wit: on October 3, 1918, an order allowing an appeal to this Court was signed by the Judge of the Court Below, which said appeal was, by stipulation of the parties and their attorneys, dismissed and the appellant surrendered to the said Commissioner of Immigration for deportation.

Thereafter, to wit: December 9, 1919, a new petition for writ of habeas corpus, No. 16738, was filed in the aforesaid District Court, to which a demurrer was interposed and filed December 19, 1919, and on February 10, 1920, an order sustaining the demurrer and dismissing the petition was filed therein. It is from said order and judgment sustaining the demurrer and dismissing the petition that this appeal is taken.

ARGUMENT.

Counsel for appellant discusses three points in the brief filed in this case.

The first point raised is that when a proceeding has been commenced under the Act of February 20, 1907, and is pending when the act of February 5, 1917, is passed, that the Immigration authorities are prohibited by Section 38 of the last mentioned act from instituting proceedings under said act.

On November 20, 1915, the Secretary of Labor issued his warrant, No. 53991/80, under the Immigration Act of February 20, 1907, for the arrest of one Man Singh charging "that he entered in violation of Section 36 of said Act" (Rule 13) (Exhibit A, page 3). Said warrant was based on the testimony of Dovan Singh, alias Pahn Singh, who testified that he had been smuggled into the United States, together with others, from Mexico by said Man Singh, on or about the 1st day of November, 1915. (Exhibit A, page 5).

It further appears that said Man Singh and one

Boota, alias Gulam Rosool, were later indicted in two separate indictments by a Federal Grand Jury in the United States District Court for the Southern District of California. (Exhibit A, page 7.). That said Man Singh was not brought to trial on said indictments because he was a fugitive from justice, and the witnesses, Dovan Singh and Harman Singh, had been deported before his arrest at Payson, Utah, in September, 1917. (Exhibit A, page 102).

It further appears that the aforesaid warrant was returned to the Bureau of Immigration at Washington, D. C., June 25, 1917, the alien not having been arrested thereunder. (Exhibit A, page 33).

Thereafter, on September 6, 1917, Inspector Plumley of the Salt Lake office, having located Man Singh at Payson, Utah, requested that the aforesaid warrant of arrest be revived (Exhibit A, page 36) and thereafter, on September 18, 1917, a new warrant was issued for the arrest of said Man Singh. (Exhibit A, page 38.) It was under this last named warrant that the present proceedings, resulting in the issuance of the warrant and order of deportation (Exhibit A, page 108) were had.

During all these proceedings (Exhibit A, pages 79-50) the said Man Singh was at all times represented by counsel, who filed a brief in his behalf (Exhibit A, page 95).

Inspector Plumley, in his report, summarizes the evidence in the case and recommends deportation (Exhibit A, page 87) and the Secretary of Labor,

after a careful review of all the evidence (Exhibit A, page 102) ordered the alien's deportation to India (Exhibit A, page 103).

The last proviso of Section 38 of the Act of February 5, 1917, cited by counsel for petitioner, provides as follows:

> "PROVIDED FURTHER, that nothing contained in this Act shall be construed to affect any prosecution, suit, action or proceedings brought, or any act, thing or matter, civil or criminal, done or existing, at the time of the taking effect of this Act, *except as mentioned in the third proviso of Section 19 hereof:* but as to all such prosecutions, suits, actions, proceedings, acts, things or matters, the laws or parts of laws, repealed or amended by this Act, are hereby continued in force and effect."

The third proviso of said Section 19 is as follows:

> "PROVIDED FURTHER, that the provisions of this Section, with the exceptions hereinbefore noted, shall be applicable to the classes of aliens therein mentioned, irrespective of the time of their entry into the United States."

Said Section 19 further provides as follows:

> *"That at any time, within five years after entry* any alien who, at the time of entry was a member of one or more of the classes excluded by law; *** at any time within three years after entry, any alien *who shall have entered* the United States by water, at any time or place other than as designated by Immigration officials, or by land at any place other than one designated as a port of entry for aliens by the

> Commissioner General of Immigration, or at any time not designated by Immigration officials, *or who enters without inspection,* shall, upon the warrant of the Secretary of Labor, be taken into custody and deported ***."

It is the Government's contention that the last proviso in Section 38 has no application to any of the classes of aliens subject to arrest and deportation under the provisions of said Section 19 by reason of the exception contained in said proviso, to wit:

> "Except as mentioned in the third proviso of Section 19 hereof."

It will be noted that Man Singh entered the United States without inspection on or about November 1, 1915, and was given his first hearing at Payson, Utah, October 5, 1917 (Exhibit A, page 79) and that neither the three-year period nor the five-year period had elapsed since his unlawful entry.

This Court has already held, in the case of Ng Fung Ho, et al, vs. White, 266 Fed. 765, that said Section 19 is retroactive and that an alien who entered the United States before the passage of said act may be deported under that act if proceedings are instituted within the time limits stated therein.

WAS MAN SINGH A PERSON LIKELY TO BECOME A PUBLIC CHARGE AT THE TIME OF HIS ENTRY INTO THE UNITED STATES?

It is true that there are decisions holding that the term "public charge" is to be applied only to those

who are suffering from some physical disability of such a character as to prevent their earning a livelihood. In the present case, however, the record shows that Man Singh entered the United States from Mexico without inspection on or about November 1, 1915; that at that time he smuggled into the United States several other aliens, and that he was later indicted for violations of Section 37 of the Criminal Code and Section 8 of the Act of February 5, 1917. Having thus violated the provisions of both the Immigration Laws and the Criminal Code, he became a person likely to become a public charge, being subject to arrest and deportation at the expense of the Government, and to a criminal prosecution and imprisonment under said indictments. However, whether or not he was a person likely to become a public charge at the time of his entry is immaterial, as that is only one of the grounds upon which his deportation was ordered. The fact still remains that he did enter without inspection, which of itself is sufficient grounds for his deportation.

DOES THE RECORD CONTAIN ANY COMPETENT OR SUFFICIENT EVIDENCE OF MAN SINGH'S ENTRY WITHOUT INSPECTION AND IS HIS IDENTIFICATION AS THE PERSON MENTIONED IN THE WARRANT SUFFICIENT?

On page 5 of the record, we have the sworn testimony of Dovan Singh that he and Takur Sing

were smuggled into the United States from Mexico by Man Singh November 7, 1915, and describing in detail the method and manner of their surreptitious entry. It further appears that Boota Singh, alias Gulam Rosool, who was jointly indicted with Man Singh was deported to India February 21, 1917, after having served a term of imprisonment on a charge of smuggling aliens into this country, and that the aliens, Dovan Singh and Harman Singh, were deported to Mexico instead of India, the deportation of the two last having been stayed that they might appear as witnesses against Man Singh, who was then a fugitive from justice, if arrested. (Exhibit A, page 102).

AS TO IDENTIFICATION.

It is true that the Immigration record in this case, which is on file as respondent's "Exhibit A," does not show any positive or absolute identification of the alien under arrest being the Man Singh referred to in the testimony of Dovan Singh. The alien at first refused to have his photograph taken, but this objection was later withdrawn, but before said photograph was taken the alien withdrew his consent thereto and it was not until after it became necessary to supply a photograph of the alien to be attached to his passport, which he was obliged to have from the British Consulate in San Francisco before he could be deported, that any photograph was furnished, and this photograph was not furnished until long after the decision rendered in this

case by the Secretary of Labor, and, therefore, does not appear in respondent's "Exhibit A."

However, the Man Singh under arrest answers to the description given by Dovan Singh of the person known to him as Man Singh, who was responsible for bringing him into the United States.

Since the warrant of deportation was issued, Man Singh has admitted his identity and furnished photographs of himself which have been identified, as appears from the following copies of correspondence now on file with the Commissioner of Immigration at San Francisco, California, which correspondence is open to the inspection of this Honorable Court should it so desire.

"U. S. DEPARTMENT OF LABOR,
Immigration Service.

In answering refer to
No. 12020/2589

Office of the Commissioner
Angel Island Station
via Ferry Post Office
San Francisco, Cal.
Jan. 29, 1918.

Inspector in Charge,
U. S. Immigration Service,
Denver, Colorado.

Copy of warrant of deportation No. 53991/80, directing the deportation to India of Rom (or Ram) Singh, has been received from the Bureau. Also, instructions that you should be advised sailing dates of vessels on which alien may be deported. These are as follows:

S.S. "Columbia," February 9
S.S. "China," February 22
S.S. "Venezuela," March 9

It is necessary in cases of this kind that passports be obtained, and for this purpose six photographs of alien, together with the following information should be forwarded to this office:

Name;
Age;
Where born;
Father's name;
Village of residence in India and district in which such village is located;
Physical marks;
Last place of residence;
Date and place of entry into the United States;
Home in India.

Respectfully,
EDWARD WHITE,
Commissioner.

U. S. DEPARTMENT OF LABOR
Immigration Service.

Office of Immigrant Inspector
Salt Lake City, Utah
February 7, 1918.

No. 503/29.
(12020/2589)

Comissioner of Immigration,
Angel Island,
San Francisco, Calif.

In accordance with yours of the 29th ultimo, No. 12020/2589, I enclose six photographs of

MAN SINGH, or Mahan (Mohn) Singh, or Ram (Rom) Singh, or John Singh;
Age, 48 years;
Born village Sodoonegel, district Ameretsir, state Punjab, India.
Village of residence and district; The same.
Home in India; The same.
Father—Natah Singh.
Last place of residence—Payson, Utah, U. S. A.
Entered near Calexico, Calif., about Nov. 7, 1915.
Height—5-8 3/4 without shoes.
Weight—167 lbs.
Complexion—Dark Brown.
Eyes—Maroon; deepset.
Hair—Black; slightly gray. Wears hair long and tied on head. Wears white turban.
Beard—Black, tinged with gray.
Teeth—Poor.
Occupation—Farmer; laborer.
Marks—Prominent snag tooth on right side, upper jaw, projecting over two others.
Walks with peculiar shuffling gait, as though with heavy burden; rolls slightly on right heel. (Not noticeable when walking a short distance.) Small pitmarks on face and forehead; pitmarks on nose.
Speaks Hindu and some English; writes name in English.

Tracing of signature:

(Signed) Rom Singh

Please advise when the passports are issued and the alien may be delivered.

Also, I have a Japanese who may be deported. Is the same procedure necessary?

(Signed) D. A. PLUMLEY.
Inc. Immigrant Inspector.

U. S. DEPARTMENT OF LABOR
Immigration Service

12020/2589
2603

Office of the Commissioner
San Francisco, Cal.
February 20, 1918.

H. B. M. Consul-General,
261 Market Street,
San Francisco, California.

Sir:

I have the honor to advise you that it is proposed to deport to Calcutta, India, on the SS "Tenyo Maru," scheduled to sail from this port on Monday, February 25, 1918, the two East Indians named below. Following is the data for which please issue the usual passoprts permitting these two aliens to enter India.

Amer (or Sunder) Singh
35 years of age (born 1882)
Born at Bal, Gullunder, Punjab, India
Weight 152 lbs
Eyes Dark Brown; squinted
Heavy black hair and moustache
Marks—Tattoo mark resembling cross on back of right wrist
Father—Name will be secured later.

Man Singh, or Mahan (Mohn) Singh, or Ram, (Rom) Singh
Age 48

Born Sodconegel, Amerestir, Punjab, India
Home in India—The same
Father—Natah Singh
Last place of residence — Payson, Utah, U. S. A.
Entered near Calexico, Cal., Nov. 7, 1915,
Height 5-8 3/4 Weight 167 lbs.
Complexion — Dark Brown Hair — Black, slightly Gray.
Marks—Small pitmarks on face and forehead.
Photographs of both aliens inclosed.

Respectfully
(Signed) EDWARD WHITE
Commissioner.

F. H. H. M.

Telegraphic Address
"Breastrail" San Francisco
Telephone Sutter 5290

BRITISH-CONSULATE GENERAL
San Francisco
27th February 1918.

Sir:

With reference to your letter of the 20th instant No. 12020/2589
2603

I have the honour to inform you that in accordance with your request Emergency Certificates of Nationality were recently issued to the two East Indians named and were handed to the representative of your office, who called here some days ago.

In this connection I have the honour to request that you would be so good as to inform

me of the reasons for which the two Indians named were deported. This information is desired for communication to the British authorities concerned.

I have the honour to be,
Sir,
Your obedient servant
(Signed) A. CARNEGIE ROSS
H.B.M. Consul-General.

The Hon. Edward White,
Commissioner of Immigration,
San Francisco, Cal.

M.

U. S. DEPARTMENT OF LABOR
Immigration Service

In answering refer to
No. 12020/2589
2603

Office of the Commissioner
Angel Island Station
via Ferry Post Office
San Francisco, Cal.

March 5, 1918.

British Consul-General,
San Francisco, Cal.

Sir:

Referring to your communication of February 27, I have the honor to advise you that Amer Singh and Man Singh, the two East Indians for whom you issued emergency certificates of nationality, were to have arrived here from Salt Lake City, Utah, for deportation on the S.S. "Tenyo Maru", which sailed Feb. 25th. They, however, were not delivered, and it is un-

known at this time when they will be deported. As per your request, however, you are further advised that in case they are deported it will be on the grounds that they were persons likely to become public charges at the time of their entry into the United States, and that they entered without inspection.

Respectfully,

Exact copy as signed by W. H. Wilkinson
mailed this day by W

Acting Commissioner.

FH/W

U. S. DEPARTMENT OF LABOR
Immigration Service

Office of Immigrant
Inspector

No. 503/29. Salt Lake City, Utah
(12020/2589)

March 16, 1918.

Commissioner of Immigration,
Angel Island,
San Francisco, Calif.

The attached copy of letter refers to MAN SINGH now under order of deportation, who will probably be delivered to you for the sailing of s/s "Ecquador" on April 6th by Inspector Mansfield, of the Denver office.

This man now has Calcutta exchange for 1264 rupees, which I secured for him to-day, same costing $456.00. He has about $49 cash at present.

This for your information.

(Signed) D. A. PLUMLEY
Immigrant Inspector.

U. S. DEPARTMENT OF LABOR
Immigration Service

Office of Immigrant Inspector
No. 503/29 Salt Lake City, Utah

March 16, 1918.

Imperial Valley Bank,
Brawley, Imperial Co., Calif.
(Attention of Mr. M. G. Doud, Cashier.)

Gentlemen:

Complying with your letter of the first instant, I return check to your order for "Balance of account", signed in Hindu by the alien under arrest, who has also impressed thereon the prints of the first three fingers of his right hand; same witnessed by me.

This man is 48 years of age: born village of Sodoonegel, district of Ameretsir, state of Punjab, India; father was Natah Singh; was in partnership with Sodager Singh near Brawley, and left in November 1915; height 5-ft. 9 3/4 in; weight, 167-lbs.; dark brown complexion; maroon eyes, deepset; black hair, slightly gray, worn long and tied up on head; wears white turban; black beard, tinged with gray; occupation is farmer and laborer; poor teeth, has prominent snag tooth on right side, upper jaw, projecting over two others; small pitmarks on face and forehead, pitmarks on nose; walks with peculiar shuffling gait, as though with heavy burden; rolls slightly on right heel. Wanted as MAN SINGH. When arrested was known as Ram Singh and only recently admitted his name is Man (pronounced Mun or Mohn) Singh.

Please remit his balance to U. S. Commissioner of Immigration, Angel Island, San Francisco, Calif., whose reference number is 12020/2589. Kindly send exchange on Calcutta, India, instead of San Francisco draft. I inclose signature and finger prints for you to send to your correspondent bank.

Respectfully,

(Signed) D. A. PLUMLEY
Immigrant Inspector.

IMPERIAL VALLEY BANK
Commercial Savings
Brawley, Imperial Co., Cal.
March 23rd, 1918.

U. S. Commissioner of Immigration,
Angel Island, San Francisco, Cal.

Gentlemen:

At the request of D. A. Plumly, Immigrant Inspector at Salt Lake City, we are enclosing herewith our San Francisco exchange No. 1203 payable to your order for $10.93, being the balance to the credit of Man Singh, $11.03, less exchange charge, 10c.

Mr. Plumly requested that we forward exchange on Calcutta, India, but in as much as we do not issue foreign exchange, we enclose draft as above.

We also enclose note signed August 11th, 1915, by Wahab Din, payable to the order of Man Singh for $160.00, we having found this note in Man Singh's pass book.

We also enclose finger prints and specimen signature as forwarded to us by the Inspector at

Salt Lake City, who advises us that your reference number is 12020/2589.

Very truly yours,
(Signed) R. R. STILGENBAUR
RRS/FB A/Cashier.

U. S. DEPARTMENT OF LABOR
Immigration Service

Office of Inspector in Charge
355-357 Federal Building
No. 3305/10 Denver, Colo.
May 9th, 1918.

Commissioner of Immigration,
San Francisco, California.

Referring to your File No. 12020/2589, re Man Singh, who was delivered at your port for deportation on April 5th, there is transmitted herewith copy of letter from the Los Angeles office relative to this alien.

(Signed) HENRY H. MOLER
M
WRM/L Inspector in Charge.

U. S. DEPARTMENT OF LABOR
Immigration Service

Office of Inspector in Charge
L. A. No. 5541/124-A Calexico, Cal.
In answering refer to May 4, 1918.
No. 96/81

Inspector in Charge,
Immigration Service,
Los Angeles, California.

Referring to your letter of the 1st instant, No. 5541/124-A. you are advised that we have

repeatedly made inquiries concerning this Hindu alien, and though a number of people recognize the photograph as the Hindu they knew in this valley two or three years ago, none of them can testify that he was known as Mahan Singh.

However, yesterday while in El Centro on other business, Inspectors E. H. Parsons and F. G. Ellis showed this photograph to another Hindu in jail at El Centro, named Kardeen, and also a Hindu named R. Kahn. Both recognized the photograph immediately upon it being shown them, and stated it was Mahan Singh, who they stated operated a ranch about two years ago about three miles northeast of Rockwood, California. R. Kahn also pointed to another Hindu on the streets of El Centro and stated that this third Hindu also knew Mahan Singh. This third Hindu was interviewed by Inspector Ellis, being taken aside for that purpose, and he also immediately recognized the photograph, and stated it was Mahan Singh, who had formerly operated a ranch northeast of Rockwood, California, and who had left that vicinity because the Government officers were looking for him to arrest him for bringing other Hindu boys from Mexico.

As Inspector Ellis had little time at his disposal in El Centro yesterday, a formal statement was not obtained from these Hindus. As Mahan Singh was already awaiting deportation on February 28th, and report was requested by Inspector Plumly in order to assure attorney for the Hindu that Mahan Singh is not being deported in error, it is not thought advisable to

incur considerable expense in making a special trip to Rockwood and vicinity to secure sworn statements from the above mentioned Hindus, it being thought statement of this kind is sufficient for the purposes intended.

Photograph of Mahan Singh is herewith returned.

(Signed) A. A. MUSGRAVE
Inspector in Charge.

In sustaining the demurrer and dismissing the petition in this case his Honor, Rudkin, District Judge, says:

"On the 21st day of January, 1918, the Assistant Secretary of Labor issued his warrant, reciting that the petitioner had been found in the United States in violation of the Immigration Act of February 5, 1917, to wit: 'That he was a person likely to become a public charge at the time of his entry into the United States; and that he entered the United States by land at a plaec other than a designated port of entry for aliens,' and directing that he be deported and returned to India the country whence he came. The petitioner has filed an application for a writ of habeas corpus claiming that the hearing awarded him by the Department was unfair and raising other questions which will be refererd to presently. The finding of the Department that the petitioner entered the United States in the year 1915 from the Republic of Mexico by land at a place other than one designated as a port of entry is supported by competent testimony and beyond this the Court is not at liberty to review that finding. In determin-

ing the character of the entry it matters little whether we look to the act of February 20, 1907, or to the act of February 5, 1917, because the provisions of the two acts are substantially the same. See section 36 of the act of 1907 and section 19 of the act of 1917. And if the petitioner entered the United States unlawfully it matters little whether he is deported under the act of 1917 or the act of 1907 because the procedure for the deportation is the same under both acts. The demurrer will therefore be sustained and the petition dismissed. Let an order be entered accordingly."

We submit that the record in this case does not disclose any unfairness or abuse of discretion on the part of the Immigration officials in the conduct of the hearing accorded this alien.

While the identity of the alien under arrest as the Man Singh referred to by Dovan Singh in his testimony was not as complete and convincing as it might have been when the case was passed upon by the Secretary of Labor, yet the fact that the alien has since admitted his identity we submit that he has not been deprived of any substantial right to which he was entitled, and that no injustice is being done him, and confidently urge and believe that the judgment of the Lower Court should be affirmed.

Respectfully submitted,

FRANK M. SILVA,
United States Attorney,
BEN F. GEIS,
Assistant U. S. Attorney,
Attorneys for Appellee.

No. 3577

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MON SINGH, sometimes referred to as MAN SINGH,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration, Port of San Francisco,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

GEO. A. MCGOWAN,
550 Montgomery Street, San Francisco,
Attorney for Appellant and Petitioner.

No. 3577

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

MON SINGH, sometimes referred to as MAN SINGH,

Appellant,

vs.

EDWARD WHITE, as Commissioner of Immigration, Port of San Francisco,

Appellee.

APPELLANT'S PETITION FOR A REHEARING.

To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

This court decided as follows:

> "Recurring to the description, it will be noted that Dovan Singh makes no reference to the snag-tooth, but does speak of the limp and 'pitmarks' on the face. The description given when previous warrant was applied for places the snag-tooth on the left side, shows the limp, but makes no reference to 'pitmarks' on the face. The man examined had a snag (or hood) tooth, located on the right side, upper jaw;

was 'pitmarked' about the face, but walked with no perceptible limp.

"The circumstances are peculiar, and how the evidence is to be reconciled is not for us to say. It is obvious that the evidence offered and admitted was competent in character, in view of the practice before an inspector of immigration, and tends in some degree to identify petitioner as the man wanted. The case is not one of total absence of competent testimony, nor one where but one conclusion may be drawn. We are impressed that the record is one for the exercise of independent judgment by the Secretary of Labor, and the court is bound by his conclusion. We are the more reconciled to this conclusion in view of the fact that since the order of deportation was issued the petitioner has admitted to the inspector that his true name is Man Singh, pronounced Mun or Mohn Singh."

Appellant petitions for a rehearing:

First:—It is not sufficient that there should be evidence which *"tends in some degree to identify the petitioner as the man wanted"*. The Supreme Court rule is that *"it must find adequate support in the evidence"*. This court has ruled that the *"best evidence"* must be presented.

Second:—It is a dangerous expedient to depart from the Transcript of Record in the ascertainment of determinating facts.

The Secretary of Labor attempts to deport this appellant out of the United States claiming that he entered without inspection by an immigration official. The appellant has denied this charge under

oath. There is no personal identification of the appellant. The evidence in the record used as the foundation for the issuance of the warrant of arrest and of the warrant of deportation was the testimony of an East Indian named Dovan Singh, that he had been smuggled into this country from Mexico. Dovan Singh was deported by the Government and sent out of the country before the arrest of this appellant. There never was a personal identification, or even an identification by photograph of this appellant by Dovan Singh. The only evidence contained in the record was a physical description given by Dovan Singh of a man whom he claims brought him into this country from Mexico. A criminal charge was made against the parties implicated, though no arrests were made. This appellant was arrested in this deportation case after Dovan Singh was deported to India.

The question at the threshold of this case is whether or not there is *an adequate showing* in the evidence that this appellant is the man whose personal description was given by Dovan Singh. If the evidence does not adequately support the contention that this appellant is the man referred to by Dovan Singh then the Government's case must fall to the ground. This honorable court has stated that the evidence *"tends in some degree to identify the petitioner as the man wanted"*, but I respectfully submit that the true test as laid down by the Supreme Court is not whether the evidence *"tends in some degree"*, but, on the contrary, is much

stronger and exacts that *"it must find adequate support in the evidence"*.

In each one of the many cases that have been before the Supreme Court testing the sufficiency of such executive action, that tribunal has laid down and enunciated different principles. The last case so decided is that of *Kwock Jan Fat v. White* (253 U. S. 454, 457-8; Sup. Ct. 566, 567-8) in which a recapitulation was made as follows:

> "It is fully settled that the decision by the Secretary of Labor, of such a question as we have here, is final, and conclusive upon the courts, unless it be shown that the proceedings were 'manifestly unfair', were 'such as to prevent a fair investigation', or show 'manifest abuse' of the discretion committed to the executive officers by the statute, Low Wah Suey v. Backus, supra, or that 'their authority was not fairly exercised, that is, consistently with the fundamental principles of justice embraced within the conception of due process of law', Tang Tun v. Edsell, Chinese Inspector, 223 U. S. 673, 681, 682, 32 Sup. Ct. 359, 363 (56 L. Ed. 606). The decision must be after a hearing in good faith, however summary, Chin Yow v. United States, 208 U. S. 8, 12, 28 Sup. Ct. 201, 52 L. Ed. 369, and it must find adequate support in the evidence, Zakonaite v. Wolf, 226 U. S. 272, 274, 33 Sup. Ct. 31, 57 L. Ed. 218."

After enunciating the foregoing principles the court concludes its opinion as follows:

> "The acts of Congress give great power to the Secretary of Labor over Chinese immigrants and persons of Chinese descent. It is a power to be administered, not arbitrarily

> and secretly, but fairly and openly, under the restraints of the tradition and principles of free government applicable where the fundamental rights of men are involved, regardless of their origin or race. It is the province of the courts, in proceedings for review, within the limits amply defined in the cases cited, to prevent abuse of this extraordinary power, and this is possible only when a full record is preserved of the essentials on which the executive officers proceed to judgment. For failure to preserve such a record for the information, not less of the Commissioner of Immigration, and of the Secretary of Labor than for the courts, the judgment in this case must be reversed. It is better that many Chinese immigrants should be improperly admitted than that one natural born citizen of the United States should be permanently excluded from his country."

I submit that in the light of the great principles set forth by the Supreme Court it is imperative that the Secretary of Labor should have had ADEQUATE EVIDENCE to support his decision, as pointed out by this court in *Backus v. Owe Sam Goon* (235 Fed. 847-854) and *White v. Tom Yuen* (244 Fed. 739-741):

> "'As has been repeatedly stated, it is not our function to weigh the evidence in this class of cases; but we may properly consider the jurisdictional question of law whether there was evidence to sustain the conclusion that the accused was in the United States in violation of law and subject to deportation under section 21 of the Immigration Act. In the absence of the best evidence attainable to sustain the same, we may also conclude that the order of deportation was arbitrary and unfair, and subject to judicial review.'"

In each of these two last mentioned Chinese cases there was evidence *which tended in some degree to identify the defendant* as one illegally in the United States. It was evidence given under oath before an immigration inspector prior to the hearing of the alien. In each one of those cases the trial court held, and this court approved, and further elaborated upon the legal proposition, as hereinbefore set forth. In each of these cases against the two Chinese there was the sworn statement of witnesses that they knew the Chinaman and had seen him in Mexico and identified him by photograph. In the present case the evidence is far weaker; there is no photograph presented, and there is no such personal identification. The witness in question, Dovan Singh, gave a general personal description of a man who brought him from Mexico. The two essential points of that description were set forth in a letter dated April 11, 1917, and contained on page 66 of the immigration record, from Chas. T. Connell, the inspector in charge of the Los Angeles office, to D. A. Plumley, wherein he writes as follows:

> "The alien Man Singh *walks with a limp,* on the right side of heel on right foot. The same is very noticeable when he walks."

Whereas a "confidential Hindu informant", Jo Allah, sets forth the remaining prominent distinguishing mark—

> "Prominent snag tooth on left side, upper jaw, seemingly projecting over two others."

It is, indeed, singular that these two individual distinguishing marks, and the only two which would prevent the remaining portions of the description being applicable to any adult of the Sikh class, were found to be missing in this detained, as shown by the report of the Bureau of Immigration for the Secretary of Labor at page 101 of the immigration record, where it is set forth:

> "It will be noted (pp. 8-13) that alien answers to the description of the man wanted, except that he does not now walk with a perceptible limp and his snag or hood tooth is on the right side instead of the left."

I maintain and respectfully present to the court that the *"best evidence"* rule it upheld in the cases of *Owe Sam Goon,* supra, and *Tom Yuen,* supra, is equally, if not more applicable, in the present case. In the cases of the two Chinese at least there was an identification by photograph, but this case presents not even that class of evidence. In the case at bar, as well as the cases of the two Chinese, which are referred to, there was the sworn testimony of a Government witness before an immigration officer, and in the case of the two Chinese there was an identification of what was admitted to be a photograph of the respective Chinese defendants. In the present case no photograph was used, and the only identification attempted was to ask the witness for a personal description of the alien who had brought him over. The "best evidence" rule would have exacted considerably more than was presented in

this case. The best evidence would have been the personal testimony of Dovan Singh confronting this defendant and identifying him. The Government had the means to hold Dovan Singh by indicting him in the criminal case referred to in the record, and holding him as a defendant or a detained witness. The Government also had recourse to call the "confidential" "Hindu informant" Jo Allah, but it did neither the one nor the other. Dovan Singh was shipped out of the country and sent back to India, why we do not profess to know, except that we submit that when the Government, of its own initiative, sent its best evidence out of the country, and decided to abandon the criminal prosecution, that such action, being voluntarily taken upon the part of the Government, must of necessity be construed against it, for as stated in *Backus v. Owe Sam Goon,* supra, at page 853:

> " * * * The rule of evidence in this respect is that no evidence shall be admitted, which, from the nature of the case, supposes still greater evidence behind in the party's possession or power. Clifton v. United States, 45 U. S. (4 How.) 242, 247, 11 L. Ed. 957. The presumption in such case is that, if the legal testimony had been produced, it would have been unfavorable, if not directly adverse, to the case. Clifton v. United States, supra."

The "confidential Hindu informant" should have been called to testify for the Government and satisfactorily establish the identity of this appellant. He was in the Government's pay in this matter and it was incumbent upon the Government to present

its best evidence. Not having done so the inference naturally follows that, if presented, the testimony would have been adverse. The excuse given by the Government for not producing the best evidence is:

> "Personal identification of alien by the officers in the vicinity of Calexico was impracticable because of the heavy expense involved. * * *"

This is the first time we have ever heard the financial yardstick advanced as an excuse and justification for departing from the best evidence rule which American justice fundamentally exacts. The executive officers did avail themselves of the confidential information of this witness, and very improperly so, as we contended. With respect to such matters this court held in *Chew Hoy Quong v. White* (249 Fed. 869, 870), as follows:

> " * * * However far the hearing on the application of an alien for admission into the United States may depart from what in judicial proceedings is deemed necessary to constitute due process of law, there clearly is no warrant for basing decision, in whole or in part, on confidential communications, the source, motive, or contents of which are not disclosed to the applicant or her counsel, and where no opportunity is afforded them to cross-examine, or to offer testimony in rebuttal thereof, or even to know that such communication has been received."

I am not unmindful of the fact that this court states "so that the petitioner's story of himself is a vacillating one". But the circumstances adverted

to by the court are not dissimilar to those involved in *Backus v. Owe Sam Goon,* supra (pages 853-54), wherein it is set forth:

> "But it is contended that, when the accused was arrested, he was unable to explain the circumstances connected with his presence in a freight car arriving at Tucson from the East. This fact may be a ground for some suspicion and possibly some conjecture as to where he came from; but mere suspicion or conjecture were not sufficient upon which to base a judgment that transfers the exclusive jurisdiction to make the inquiry from the courts of the United States to the Department of Labor."

We are here called upon to consider the jurisdictional question of law whether there was adequate evidence to call in operation the jurisdiction of the Department of Labor and upon such jurisdictional questions the court must determine whether there was adequate evidence, within the best evidence rule, to sustain it. These administrative executive hearings have been very forcefully and aptly described by the Supreme Court of the United States in *United States v. Woo Jan* (245 U. S. 552; 28 Sup. Ct. 207), wherein it is adverted to that "*mere discretion prompts the first and last act of the * * *"* administrative hearing, and that it has not "*the security of procedure and ultimate judgment of the judicial tribunal, where all action which precedes judgment is upon oath and has its assurance and sanction*". The above expressions were re-affirmed in *White v. Chin Fong* (253 U. S. 90; 40 Sup. Ct. 449).

It is respectfully contended that a rehearing should be granted in this matter upon this point, for the reason that there is not adequate supporting evidence of the theory upon which this appellant is sought to be identified as the man who brought Dovan Singh into the United States, and that such evidence as is presented is inadmissible under the best evidence rule as enunciated and upheld by this court in the cases of the two Chinese persons hereinbefore referred to.

The Second Point is that it is a dangerous expedient to depart from the Transcript of Record in the ascertainment of the determinating facts. The opinion of the court concludes:

> "We are the more reconciled to this conclusion in view of the fact that since the order of deportation was issued the petitioner has admitted to the inspector that his true name is Man Singh, pronounced Mun or Mohn Singh."

This condition is brought about by the attorney for the Government incorporating in his brief several pages devoted to copies of correspondence which took place after the order of deportation was made in this matter. The appellant has never been confronted with these letters or had an opportunity to be heard with respect thereto, and it is respectfully submitted that it is grossly unfair to prejudice his rights by anything therein contained.

It seems to appellant that he should have his day in court on a matter that is entirely without the record, before it is used to deprive him of a most vital

right inherent in his residence among us. The injection of this matter into the case long after its submission to this court, by placing it in their brief, left appellant no apt or reasonable opportunity or chance to be heard in answer thereto. The establishment of such a precedent we view with alarm. It is contrary to three almost contemporaneous decisions of this very court: *Jeung Bock Hong v. White* (258 Fed. 23); *Louie Share Gan v. White* (258 Fed. 798) and *Lim Chan v. White* (262 Fed. 762). In the first case it is held, the court speaking through Circuit Judge Morrow:

> "In this case no such claim was made in the petition for the writ of habeas corpus, and no such claim was made in the court below or on the appeal to this court. It was made for the first time in the addendum to counsel's brief after the submission of the case in this court. In the absence of a record presenting the proceedings referred to, it cannot be considered on appeal."

In the last case which was decided on February 2, 1920, it is held, the court speaking through Circuit Judge Gilbert:

> "It is presented for the first time in a brief filed in this court. It cannot avail the appellant here."

Returning to this correspondence contained in respondent's brief we find first, a letter from Commissioner White to the inspector at Denver giving information as to the deportation of appellant to India and requesting information as to his passport. Next follows the answer from the immigrant

inspector at Salt Lake City. It is noted that all of the information with respect to this man is given by Inspector Plumley and not by this appellant. The occupation, the physical description and weight, and all of these things are not only supplied by the inspector but the signature attached to the bottom thereof is a tracing of the signature of Rom Singh, probably from the notes which he signed at the conclusion of his examination at the immigration hearing. It should not be accepted that this appellant has signed this application for a passport because he assured me that he never did any such thing. Following is a letter from Commissioner White giving this information to the British-Consul General, and that, in turn, is followed by a letter from the British-Consul General asking why this man was to be deported, and this was again followed by a letter from Commissioner White giving the reasons why this man was to be deported. Then followed some letters from a bank at Brawley, Imperial County, California, relative to a bank account.

Now all these matters are not a confession or a declaration against interest by this appellant. At no time, and at no place, have we been pointed to an admission by him that he was the man who brought Dovan Singh from Mexico into the United States, and that is the one determinating and determinative issue in this case. As pointed out in our brief in this matter the word "Singh" is simply an appellation added to the name of every East Indian who belongs to the "Sikh" religious sect; in no

sense is it used as a means of personal identification other than to describe the man as being a Sikh instead of a Mohammedan or a Hindu. For Dovan Singh to have said that a person by the name of Man conducted him across the Mexican border is no more than to say that a person by the name of George, or Harry, or Jim, or Gus, or Frank, brought him across the border.

By far the great majority of East Indian residents in this country are members of the Sikh sect. We have thousands of them in our midst and many of them go by the name of Mon or Man or Mohan. We reiterate what we formerly stated that there is no adequate identification under the best evidence rule of this appellant as the Man referred to in the testimony of Dovan Singh.

Identity of person from identity of name does not follow in such a case as is here presented. In *Bun Chew* (220 Fed. 387) it is was held at page 389:

> "* * *, even if the photograph of the individual thus exhibited was that of a Bun Chew, such individual was the same Bun Chew as is now by the Department of Labor sought to be deported to China. *It is common knowledge that many different Chinese are known by the very same name; therefore, in my judgment, there can be in an* instance of this sort no presumption of identity of person because *if identity of name.*" (Italics volunteered.)

In finally submitting this petition for rehearing I do so in the firm belief that an injustice has been

done this appellant. The best evidence rule would have required a production of direct evidence as to identity. The action of the Government in sending the best witness out of the country so that he could not be here to testify and then to advance the excuse that

> " * * * Personal identification of alien by the officers in the vicinity of Calexico was impracticable because of the heavy expense involved * * * ",

seems to deprive this alien of any semblance of defending himself against his accusers. It is noted that the "Hindu informant" Jo Allah is not a Sikh, but of a different religious sect, and the quarrels and differences and bickerings between these different East Indian sects are too notorious to pass unnoticed, as notice the murder of the Hindu Ram Chandra in the courtroom by the Sikh Ram Singh at the conclusion of the Hindu Conspiracy Case in this city some years ago.

The mention of *"heavy expense involved"* seems rather misleading when we look at the letter contained in pages 18, 19 and 20 of respondent's brief. Certainly if the Government had presented witnesses of this kind who would have been subject to cross-examination by this appellant's attorneys with the opportunity of a proper counter-showing would have enabled him to demonstrate his innocence of the charge brought against him. This appellant may be only an humble rice farmer, but his right of residence in the United States is a very precious thing to him; in fact, his whole soul and existence.

It is hoped that the court will respectfully grant his petition for a rehearing.

Dated, San Francisco,
September 7, 1921.

Respectfully submitted,
GEO. A. MCGOWAN,
Attorney for Appellant and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for appellant and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition for a rehearing is not interposed for delay.

Dated, San Francisco,
September 7, 1921.

GEO. A. MCGOWAN,
Of Counsel for Appellant and Petitioner.

No. 3579.

IN THE

United States

Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Charles L. Williams,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

BRIEF OF DEFENDANT IN ERROR.

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Special Assistant United States Attorney.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles, Cal.

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BRIEF OF DEFENDANT IN ERROR.

I.

STATEMENT OF THE CASE.

Charles L. Williams was for many years cashier, vice-president and manager of the American National Bank of San Diego. That bank was consolidated with the First National Bank of San Diego about January 1, 1918, and Williams was elected president of the First National at that time. The trouble about William's transactions developed on February 12, 1918, and he resigned February 15, 1918 and the resignation was accepted about March 15, 1918. Two indictments were returned against Williams, the second one, containing thirty-seven counts, to correct irregularities

in the first. He was twice tried on the last indictment. The first resulted in a mistrial. On the second he was placed on trial on the following counts of the second indictment: 2, 3, 4, 5, 7, 9, 10, 12, 13 ,14, 16, 17, 19, 21, 22, 26, 27, 28, 29, 30, 31, 33, 34, 35, 36, and 37; total, 27.

He was not placed on trial on counts 1, 8, 11, 15, 18, 20, 23, 24, 25 and 32—ten.

The trial resulted in acquittal on counts 4, 5, 6 and 7 —four; disagreement on 2, 3 ,9, 10, 12, 13, 14, 26, 27, 28, 29, 30, 36 and 37—fourteen; and conviction on 16, 17, 19, 21, 22, 31, 33, 34 and 35—nine.

The judgment of the court from which the appeal is taken was upon counts 16, charging a false entry in the time account ledger sheet to deceive agent of comptroller; 17, false entry in report of condition of bank to deceive comptroller; 19, embezzlement of $20,000 and 21, false entry in collection register to deceive comptroller.

These four charges grew out of the M. B. Murphy transaction. Murphy deposited $26,500 in a time account. Williams entered that sum in his pass-book. He then caused the entry on the bank's books as $6,500, by making out a deposit slip in Murphy's name for that amount. He caused a long overdue and worthless note for $20,000 to be placed on the bank's collection register as the property of Mr. Murphy to represent the balance of the deposit. Murphy knew nothing of this manipulation. The First National Bank had

to make this $20,000 good to Murphy, and paid him the money.

Count 22, charges a false entry on the bank's report to the comptroller. This grew out of the Agnes Gillen matter. Mrs. Gillen had an inactive account which, in the course of years, had grown to more than $10,000. Williams drew ten thousand dollars out of this account and so manipulated her pass-book, making most of the entries with his own hand, that Mrs. Gillen was unaware of the withdrawal. The pass-book showed the deposit correctly but the books of the bank showed $10,000 less than the pass-book, and the report reflected this deception.

Count 31 charges misapplication to deceive examining agent of the comptroller. It grew out of the Fidelity Construction Company matter. This company had on deposit with the bank a large sum of money. The bank held a large amount of old notes of doubtful value and the comptroller of the currency was urging that they be disposed of. The call for a report of condition was at hand. Williams drew a check on the construction company's account for $46,219.10, signed the company's name to it "By C. L. Williams V. Pt." and withdrew from the banks that amount in the questionable notes. Williams was not, at that time, an officer of the company and had no authority whatever to draw this check, and the company's officers did not know the same had been drawn until months afterward.

Count 33 charges the abstraction from the credits of the bank of certain of the notes taken up by the $46,219.10 check to deceive the bank examiner.

Count 34 charges embezzlement of $2,000. This grew out of one Russell Williams transaction. Russell Williams deposited $2,000 with C. L. Williams as a bank official to be invested in a note. C. L. Williams deposited the $2,000 in his own personal account and checked it out in small sums until his account was exhausted.

Count 35 charges embezzlement of $3,000. The same Russell Williams after depositing the $2,000 some time, deposited $3,000 with C. L. Williams, as a bank official, to be loaned. C. L. Williams gave Russell Williams receipts for this money and deposited the money in his own account and checked it out as before.

It must be plain that prejudicial error was not committed in regard to the counts upon which Williams was acquitted. It is also clear that no prejudicial error cognizable by this court was committed on the trial of the fourteen counts upon which the jury disagreed. The disagreement cured all errors as to them. A new trial can be had.

There is no good accomplished by encumbering the record with statements and arguments about matters that the court will not consider. We will then dismiss without further attention all arguments on counts other than those upon which conviction was secured.

II.

Was the Indictment Subject to Be Quashed Because the Grand Jury Was Not Properly Drawn?

No. The evidence introduced by defendant on his motion to quash, including his own withdrawal of his objection "3rd" (brief pp. 3, 11, 12 to 19) showed without question that every formality in regard to the selection and empanelment of the grand jury had been observed and that competent testimony was introduced before the grand jury upon which to found the indictment. But, aside from this fact, the cases universally hold that a motion to quash on this ground is bad unless there is a showing of prejudice to defendant, and no prejudice is here claimed.

U. S. v. Chiares, 40 Fed. 820;
Agnew v. U. S., 165 36, 42, 44, 41 L. ed. 624, 627;
Ruthenberg v. U. S., 245 U. S. 482.

The record discloses that Judge Bledsoe had directed the clerk and jury commissioner in regard to the drawing of the jury, just as directed in section 277 of the Revised Statutes of the United States.

The testimony of the clerk, in the record, shows that when the grand jury was drawn more than three hundred names were in the box.

It is very difficult to understand why counsel continues to urge these objections when each and every

of them have been met by the evidence contained in this record and it is proven that every proceeding was regular and in compliance with the law.

The sections of the Federal Judicial Code controlling drawing and impanelment of grand juries are sections 275, 276, 277, 279, 282, 283 and 284.

State laws do not control empaneling of juries in U. S. courts except as to qualifications.

U. S. v. Reed, 27 Fed. Cas. No. 16, 134, 2 Blatchf. 435 5 Fed. Stat. Anno. (2d Ed.) 1066-7.

In enacting this statute (Federal Judicial Code, Sec. 284) Congress had no intent to legislate as to the validity of indictments. The purpose was merely to prevent the expense of having a grand jury unnecessarily summoned.

In U. S. v. Reed, 2 Blatchf. 435, 27 Fed. Cas. 727, 733, Mr. Justice Nelson held that a verbal order from the judge to the clerk to issue *venire facias* for a grand jury was sufficient. In Fries case, What. St. Tr. 453, 3 Dall 515, 9 Fed. Cas. 826, 923, Mr. Justice Iredell observed that a venire issued with the sanction of the court has the same effect as though the express order of the court had been annexed.

Breese v. U. S., 203 Fed. 824, 828.

Such order (to draw a grand jury) does not determine anything with reference to any adversary proceeding in the court, or conclude public or private

rights in any way, and amounts to nothing more than a mere administrative regulation of internal affairs relating to the order of the court,—if the grand jury be drawn by unauthorized persons, or from persons not properly selected or qualified and the like, he has his remedy by motion to quash the indictment when he is called to answer it.

Ex parte Harlan, 180 Fed. 119, 127 to 129.

A grand jury drawn by the proper authority and composed of qualified persons is authorized to sit, unless the court of which it forms a part is holding a session at an unauthorized time or place.

Ex parte Harlan, 180 Fed. 119.

The presumption, until the contrary appears, is that the grand jury acted upon legal evidence, and the burden rests on him who asserts that it did not, to prove it.

Ex parte Harlan, 180 Fed. 119.

The court will not hear evidence, on motion to quash, to determine the sufficiency of the evidence submitted to a grand jury to justify the return of an indictment.

U. S. v. Cobban, 127 Fed. 713, 718-723;
Chadwick v. U. S., 141 Fed. 225;
U. S. v. Swift, 186 Fed. 1002;
Hillman v. U. S., 192 Fed. 264, 267;
McKinney v. U. S., 199 Fed. 25, 27;
U. S. v. Nevin, 199 Fed. 831, 836;
U. S. vv. Rintelen, 235 Fed. 787;

U. S. v. Perlanan, 247 Fed. 158, 162;
Holt v. U. S., 218 U. S. 245;
U. S. v. Silverthorne, 265 Fed. 859.

Plea in abatement must be exact and specific. It is not sufficient to allege that the names of certain persons were placed in the jury box by a deputy clerk and that mover does not know whether any of these names were drawn. The motion must affirmatively show that some of such names were drawn.

U. S. v. Rockefeller, 221 Fed. 462, 466;
U. S. v. Silverthorne, 265 Fed. 859.

A motion to quash is addressed to the sound discretion of the court, and if refused, is not a proper subject of exception.

When made in behalf of defendants, it is usually refused, unless in the clearest cases, * * *.

U. S. v. Rosenburg, 74 U. S. (7 Wall.) 580, 583.

The defendant has shown no possible prejudice to his interest in the grand jury proceedings, and the court found none. The evidence submitted disproved every claim of irregularity in drawing and empaneling the grand jury and in the presenting of evidence to the grand jury. The contention of defendant is without merit.

III.

The Demurrer.

Counsel presents and argues the demurrer to various counts upon which no conviction was had. He has no appeal from these rulings. The rulings upon such counts is not a final judgment within the meaning of section 128 of the Judicial Code, and no appeal lies therefrom. We will spend no time upon such parts of the appellant's brief.

1. An indictment charging misapplication of the "moneys, funds and credits" of a bank is not duplicitous as charging three offenses, where such allegation is followed by the additional words "a more particular description of which is to the grand jurors unknown." Same rule applies to embezzlement, or abstraction of "moneys, funds and credits."

Sheridan v. U. S. Fed. 305, 310;
Breese v. U. S. 106 Fed. 680, 688;
U. S. v. Hinze, 161 Fed. 425, 429;
U. S. v. Voorhees, 9 Fed. 143;
Evans v. U. S., 153 U. S. 584;
Shepard v. U. S., 236 Fed. 73, 81.

In brief, page 20, 11.9 to 17, it is said:

"Nowhere in any of the counts, is there any allegation as to what property was embezzled, or what property misapplied, or what property was abstracted, etc."

A reading of the indictment disproves this charge *in toto*.

Count 19 charges embezzlement of the "moneys, funds and credits" of the bank "to the amount and value of $20,000, a more particular description of which said moneys, funds and credits is to the grand jurors unknown."

Count 31 charges misapplication of "moneys, funds and credits" of the bank "to the amount and value of $46,249.10" "a more particular description of which said moneys, funds and credits is to the grand jurors unknown."

Count 33 charges abstraction "from the credits of the said National Banking Association certain notes, then and there belonging to the said National Banking Association, which said notes were of the tenor following, to-wit:" Here follows the date, signatures and amount of each of fourteen different notes. Each of these counts sets up the means by which the act charged was accomplished.

Count 34 charges embezzlement of "moneys, funds and credits" "to the amount and of the value of" $2,000 "a more particular description of which said moneys, funds and credits is to the grand jurors unknown."

Count 35 charges embezzlement, in the same terms, of $3000 in value of the moneys, funds and credits.

Counts 16, 17, 21 and 22, the remainder of those upon which convictions were had, charge false entries.

2. It is said the indictment is defective because it is not alleged in counts setting up abstraction, that

such abstraction was without the consent of the bank or the directors.

The case of U. S. v. Northway, 120 U. S. 327, 30 L. ed. 664, cited in brief, does not sustain this view. That indictment alleged want of consent and it was held good. It is not held to be essential.

In the case of U. S. v. Britton, 107 U. S. 655, 27 L. ed. 520, cited in brief, the indictment charges misapplication, not abstraction.

A careful reading of section 5209 is an answer to this contention. It provides:

> "Every president, director, cashier, teller, clerk, or agent of any association, who embezzles, abstracts, or wilfully misapplies any of the moneys, funds, or credits of the association:"

Then follows the acts denounced if done without the authority of the directors. In other words, if the directors should consent that the moneys, funds or credits of the bank might be embezzled, abstracted or wilfully misapplied, they would be guilty of aiding and abetting the offense instead of affording a defense to the criminal.

In the case of Sheridan v. U. S., 236 Fed. 305, 311, the court says:

> "Nor was it necessary to allege that the money was abstracted without the consent or knowledge of the depositor. If in fact it was abstracted with such consent and knowledge, it was a matter of defense to be shown by the plaintiff in error."

In Flickinger v. U. S., 150 Fed. 1, 3, the court says:

"The statute does not make it necessary, in order to constitute an offense, for the president to make the wilful misapplication 'without authority from the directors,' although there is that special provision with respect to the unlawful issue of any of the notes of the association, or of any certificates of deposit or bill of exchange, etc. In passing upon the demurrer, the court below said:

" 'Objection is made that there is no averment that Hays discounted this paper without the knowledge and consent of the board of directors. I do not think this averment necessary, and it would not be less criminal done with the knowledge and consent of the board of directors, if the defendants and the board of directors did it under the circumstances which the indictment avers existed in connection with the action of the defendants. It appears, from the averments of these counts that the defendant Hays misapplied money and funds of the bank by discounting these notes.'

We concur in this view. The averments of these counts show, in each instance, a wilful misapplication of the funds of the bank, for an unlawful purpose, with intent to injure and defraud the bank. The transaction in each case is described in detail, and the averments, covering every element of the crime, are full and clear. There could be no proper presumption that the directors, in the ordinary course of business, would consent to the discount by the president of worthless and fictitious paper, with intent to injure and defraud

> the bank, and therefore no necessity to insert in the indictment an averment to negative such authority. If, under any circumstances, the authority of the directors, could validate such conduct on the part of the president then, in that event, which we see no reason to anticipate, the rule laid down by this court in the McKnight case would apply. It would be a matter of defense. McKnight v. U. S., 115 Fed. 972, 986, 54 C. C. A. 358."

That opinion holds as does the opinion of the Circuit Court of Appeals for the Sixth Circuit, in McKnight v. U. S., 115 Fed. 972, that if under any circumstances the authority of the directors validates such conduct, it would be a matter of defense. The McKnight opinion was rendered by Circuit Judges Lurton, Day and Severans, the opinion being written by Circuit Judge Day, afterwards judge of the Supreme Court of the United States, and on page 984, paragraph marked four, Judge Day takes up the Britton case and shows clearly that the Britton case is not in accord with the later cases by the Supreme Court, particularly the case of Claasen v. U. S., 142 U. S. 140, and Devons v. U. S., 133 U. S. 584. It is true, as said by the district judge in the Martindale case, that the indictment in the McKnight case charges that the misapplication was without the consent of the board of directors, and without the consent or knowledge of the discount committee, but Judge Day in the McKnight case holds that that allegation in the indictment was unnecessary,

and that the allegation need not be approved. Judge Day in his opinion cites the case of the United States v. Eno. 56 Fed. page 218, by the District Court of the Southern District of New York, in which Judge Benedict, at page 220, said:

> "It may be proper to add, in regard to the point made that the indictment is defective because it fails to aver that the acts charged were done without the knowledge or assent of the directors of the association, that, in my opinion, such an averment is not essential in an indictment for the misapplication of the funds of a national bank. The statute does not make absence of authority from the directors an ingredient in the crime of misapplication. I conceive that a conversion of the funds of a national bank by its president may be a criminal misapplication of the funds of the bank, although done with the knowledge and assent of the directors of the bank. The president of a national bank is not the association, nor are the president and directors the association. They are only officers of the association. The moneys of the stockholders and of the depositors in the association are not the moneys of these officers, but of the association; and it has not yet been held that a national bank may be pillaged of such moneys by its president with impunity, provided the act be done in pursuance of a conspiracy between the president and the directors, or a majority of them."

In the still later case of Stouts v. U. S., by the Circuit Court of Appeals for the Eighth Circuit, Cir-

cuit Judge Hook, in passing upon a question of this kind, involving the misapplication of the funds of the bank by loaning of money upon notes that were not well secured, at the top of page 803, states:

> "The indictment was framed and the case was tried as though the knowledge and approval of the directors would be a defense. As to this see Flickinger v. U. S., 150 Fed. page 1."

The exact question here involved and the effect of the ruling in the Britton case were very fully and carefully considered by District Judge Hough in the case of the United States v. Morse, 161 Fed., page 429. The Morse indictment contained, among others, nine counts charging misapplication. The misapplication, as charged, was a like misapplication as that charged in the indictment under consideration, and on page 435, in considering this question, Judge Hough says:

> "United States v. Martindale (D. C.), 146 Fed. 280, declares it a fatal objection not to negative the knowledge and approval of the governing authority of the bank. This is not consistent with Evans' Case, 153 U. S. 593, 14 Sup. Ct. 934, 38 L. Ed. 830.
>
> "On principle these defendants could not have possessed authority to produce or permit a conversion of the funds of the bank to Morse's use. Authority to commit a crime is an impossibility, yet nothing short of that power meets the exigencies of defendant's case if the allegations of the count are true as pleaded. It cannot be necessary

to negative a legal impossibility. To assert, as does this count, that the payment for the contemporaneous benefit of Morse was wilfully made, with intent that Morse should convert the same to his own use, without securing repayment, and with intent to defraud, does clearly aver a conversion of the funds, effected as soon as the bank paid over the money."

It is to be noted that the present indictment charges that Williams not only "with intent to injure and defraud said Banking Association," but also "divers other persons whose names are to the grand jurors unknown and who were then and there shareholders and creditors and depositors of said Banking Association, did wilfully misapply said moneys, etc." This seems to bring the present indictment clearly within the reasoning of the Morse case.

It therefore seems clear that if the proper proof shows, as the indictment charges, a wilful abstraction by the withdrawing of certain notes, as described in the abstraction counts, which notes were, as charged, applied to the use and benefit of persons other than the Banking Association, and the said notes, as is charged, were then and there wholly lost to the Banking Association or by such withdrawal the comptroller or his agent was deceived, and all of that was done, as charged in the indictment, with intent not only to injure and defraud the Banking Association, but the shareholders, creditors and depositors of said Banking Association, or with intent to deceive the comptroller

or his agent, the board of directors could not consent to such fraud upon the shareholders, creditors, and depositors and the comptroller or his agent. If they did so consent, then instead of taking from the transaction criminal liability on the part of the officer, all of those, including the directors themselves, who knowingly participated in such misapplication would be equally guilty. It must be remembered, as said by Judge Benedict in the Eno case,

> "the directors are not the Banking Association * * * The money of the stockholders and depositors is not the money of these officers."

If this were not true, then a board of four or five directors could misapply the moneys of the bank with impunity with intent to injure and defraud the shareholders, creditors and depositors and be able to say, "We are not criminally liable for any misapplication, even though we did these things with the intent as charged, because *we* consented thereto."

In the Evans case the Supreme Court fails to follow the rule laid down in the Brittan case on this point. On page 592 of the Evans opinion, last paragraph, the Supreme Court says:

> "It is objected, however, to this count that there was no averment that the cashier, in discounting the note, acted in excess of his powers or outside of his regular duties, nor was there any averment that the cashier was not the duly authorized officer of the bank to discount paper, nor was there any averment that the discount was

procured by any fraudulent means, or that Evans was at the time of such discount insolvent, or knew himself to be so. It was held by this court in Bank of the United States v. Dunn, 6 Pet. 51, that the power to discount paper was not one of the implied powers of the cashier, and this is believed to be the law at the present day. Morse on Banking, Sec. 117. If the directors of this bank had authorized their cashier, either generally or in this particular case, to discount paper, it was clearly matter of defence. But even if he did possess such power, and wilfully abused it by discounting notes which he knew to be worthless, and did this with deliberate intent to defraud the bank, it is not perceived that his criminality is any less than it would have been if he had acted beyond the scope of his authority."

This is in accord with a very able opinion by Justice Story of the Supreme Court in 26 U. S. page 44. On page 71 of that opinion Justice Story says:

"The instruction prayed for, proceeds upon the same principle, as the pleas. It supposes, that the usage and practice of the cashier, under the sanction of the board, could justify a known misapplication of the funds of the bank. What is that usage and practice, as put in the case? It is a usage to allow customers to overdraw, and to have their checks and notes charged up, without present funds in the bank—stripped of all technical disguise, the usage and practice, thus attempted to be sanctioned, is a usage and practice to misapply the funds of the bank; and to connive at the with-

drawal of the same, without any security, in favor of certain privileged persons. Such a usage and practice is surely a manifest departure from the duty, both of the directors and the cashier, as cannot receive any countenance in the court of justice. It could not be supported by any vote of the directors, however formal; and therefore, whenever done by the cashier, is at his own peril, and upon the responsibility of himself and his sureties. It is anything but 'well and truly executing his duties, as cashier.' This view of the matter disposes of this embarrassing point, and also of the second instruction prayed for by the defendants; which substantially turns upon the like considerations."

Again in Breese v. United States, 106 Fed. 680, at page 685, the court says:

"The requests numbered 9 and 10 were to the effect that if the acts charged against the defendant were permitted and sanctioned by the other officers of this bank, whose duty it was to supervise, manage, and control such matters, defendant could not be found guilty; these officers having the right, in the exercise of their official discretion, to sanction, ratify, and confirm said acts. These were properly refused. Evidence had been submitted to the jury of the acts charged. With this was evidence intended to show the intent with which the acts were done. A part of this evidence was that the defendant, with two of the other directors,—making three out of four, the whole number of directors,—had been engaged in obtaining money from the bank on wholly

worthless securities. Surely, evidence that the defendant acted with the sanction, consent, or ratification of these men could not be admissible. Apart from this, the language of the requests is broad enough to mean that, however fraudulent and illegal the acts of the defendant were, if they were permitted, sanctioned, or ratified by the other officers of the bank, they were not unlawful, a startling proposition. The most formal vote of the board of directors could not authorize the embezzlement, abstraction, or wilful misapplication of the funds of the bank. Minor v. Bank, 1 Pet. 44, 7 L. Ed. 47. The authority of the officers of the bank and of its board of directors extends only to legitimate transactions honestly intended for the benefit of the bank. U. S. v. Harper (C. C.), 35 Fed. 484."

Section 5209, after stating various forbidden acts, thus proceeds:

"* * *, *with intent, in either case*, to injure or defraud the association or any other company, body politic or corporate, or any individual person, *or to deceive any officer of the association, or any agent appointed to examine the affairs of any such association*:"

The reason for this provision is plain. There could be no governmental supervision if the officers of the bank were left free to withdraw objectionable paper to prevent the comptroller of the treasury from discovering it as a part of the assets. Hence it is made a crime to abstract moneys, funds and credits "with

intent—to deceive—any agent appointed to examine the affairs of any such association."

The indictment is well within the provisions of section 1025, Revised Statutes.

There was no error in overruling the demurrer.

IV.

Motion to Require Election.

The rule of law with relation to the requiring of the prosecution to elect upon which count it will proceed is exactly the reverse of what is urged by counsel.

> "The right of demanding an election and the limitation of the prosecution to one offense is confined to charges alleged in the indictment, *which are actually distinct from each other, and do not form parts of one and the same transaction.* * * * An indictment will not be quashed, nor will the prosecutor be put to his election as to which count he will proceed under, when the court may be doubtful if the intention be not to charge the same as cognate offenses growing out of the same transaction, but will postpone action *until it is developed by the evidence that it is sought to convict of two or more offenses growing out of separate and different transactions,* before compelling the state to elect on which count the prosecution will proceed."
>
> Hughes' Criminal Law, Sec. 2784, p. 722;
>
> U. S. v. Nye, 4 Fed. 888, 893;
>
> Toy v. U. S., 266 Fed. 326.

Such motion is always addressed to the sound discretion of the court.

U. S. v. Nye, 4 Fed. 888, 893;
Painter v. U. S., 151 U. S. 396, 400, 38 L. ed. 211.

One act may be a violation of two statutes and if each statute requires proof of an additional fact that the other does not, an acquittal or conviction under either statute does not exempt defendant from prosecution and punishment under the other.

U. S. v. Turner, 266 Fed. 248, 250;
Gavieres v. U. S. 220 U. S. 338, 55 L. ed. 489;
Bens v. U. S. 266 Fed. 152.

This procedure has been modified by section 1024 U. S. Revised Statutes, which reads:

> "When there are several charges against any person *for the same act or transaction,* or for two or more acts or transactions connected together, or for two or more acts or transactions of the some class of crimes or offenses, which may be properly joined, instead of having several indictments the whole may be joined in one indictment in separate counts; and if two or more indictments are found in such cases, the court may order them to be consolidated."

See:

Freed v. U. S., 266 Fed. 1012, 1014.

The court, in the case at bar, exercised a sound discretion in refusing to compel the election and defendant was not prejudiced thereby.

V.

Asserted Errors in Rulings on Evidence.

1. (Brief p. 27, ll. 10 to 21.) This evidence was upon counts Nos. 4, 5, 6 and 7. Appellant was acquitted on all these counts. No prejudicial error could accrue to appellant even if there was error. The inquiry was directed to the fact that a note was executed to the bank by T. C. Hammond, assistant cashier, at the request of appellant. Hammond got nothing for the note, but Williams executed to him his personal note for indemnity. The Hammond note was carried on the books of the bank as a loan. It was attempted to explain the false entries by saying the bank used the money to pay interest on some of its obligations. The evidence elicited went to the intent of appellant to deceive the bank examiner by the false entry. The ruling was right.

2. The brief of appellant, from page 27, line 10 to page 37, line 24, sets out various assignments of error based upon the rulings of the court on admissibility of testimony. There is no presentation of law, or argument, or reason for assigning the errors. The count of the indictment to which the evidence was introduced is not stated, the issue to which the evidence was addressed is not given, and no showing is made from which it can be known whether the rulings were proper or improper. Upon this trial appellant was acquitted upon four counts, convicted on nine counts and there was disagreement upon fourteen counts.

Where defendants were convicted on several counts, and the judgment was warranted by any one of several such counts, error, if any in admitting or excluding evidence relating to one count alone, is immaterial, and not ground for reversal.

Wesoky v. U. S., 175 Fed. 333;
Goll v. U. S., 151 Fed. 412.

Counsel cannot impose upon the court the duty of digging through the transcript in search of a possible error. Neither is it the duty of the United States attorney to try and guess what reason counsel had in mind, or now has in mind, for claiming the rulings of the court to be erroneous. We affirm that there is no error in this record. The presumption is that there is no error. No error is made to appear by appellant. It is not pointed out or shown where, or in what appellant was prejudiced by any ruling set out. Therefore the court will disregard the claimed errors.

The testimony introduced to show that the First National Bank made good the defalcations of appellant was restricted by the court to the single proposition that the bank suffered loss by the various transactions to which the evidence related. The jury was specially instructed by the court to this effect.

It is evident that the jury did not believe the testimony of defendant that he merely changed the places of the Goodbody note and the Murphy cash, giving the bank the cash. If they did so believe, the testimony that the bank returned the money to Murphy's

account would not have induced them to find appellant guilty of embezzlement. It would merely have shown that the bank had made good and returned the money Williams had filched from Murphy's account for the use of the bank. [Br. p. 37, l. 27 to p. 38, l. 25.)

VI.

The Instructions.

1. (Br. p. 38, l. 26 to p. 39, l. 33.) The mistake of counsel as to this portion of the instructions is found at page 39, ll. 26-33, as follows:

"Such an instruction does not accurately state the law, and is misleading, because it attempts to take away from the jury that which the law directs them to do, to-wit—determine, from the evidence, what particular count he is guilty of, and when they so find that he is guilty of one particular count, in connection with a group of counts carved out of the same transaction, that they then have made their selection, and cannot find him guilty of the other counts which deal with the same transaction;"

Of course this is not, and cannot be the law. Take, for instance, counts 16, 17, 19 and 21 which all grew out of the Murphy transaction. The act was not "carved up into various charges." Count 16 charges that a false entry was made in the "time account, ledger sheet, account number 1436, M. B. Murphy" on May 5, 1916, by entering thereon $6,500 instead of $26,500 which was the correct amount, to deceive the comptroller.

Count 17 charges that on June 30, 1916, a report of the condition of the bank was made and transmitted to the comptroller and under the head of "other time deposits" under liabilities, a false entry was made showing $20,000 less than it should have been, this being based on the crediting to the Murphy account $20,000 less than it should have been.

Count 19 charges the embezzlement of the $20,000 on May 5, 1916.

Count 21 charges a false entry May 5, 1916, in the "collection register," to deceive agent of comptroller, of the M. D. Goodbody note for $20,000 to be left for collection by M. B. Murphy.

While each of these charges arose out of one transaction, there cannot be said to be a chance for an election, or selection as to which of the various offenses were committed. It is entirely consistent that each was committed. They are separate and distinct. No error appears in this instruction.

See:

Gavieres v. U. S., 220 U. S. 338, *supra;*
Bens v. U. S. 266 Fed. 152, *supra;*
U. S. v. Turner, 266 Fed. 248, 250, *supra.*

2. (Br. p. 40, ll. 1 to 18.) The court did fully instruct the jury in regard to the presumption of innocence. The instructions given were full, and fair to defendant. It was not necessary for the court to modify every phrase of his instructions by referring to the presumption of innocence. Besides, the very

terms of the last sentence quoted would call for evidence which would overcome the presumption of innocence. I take this language to mean the overcoming not only of the presumption of innocence, but of every reasonable doubt, to-wit:

"Where the evidence is entirely circumstantial, *and yet is not only consistent with the guilt of the defendant, but inconsistent with any other rational conclusion,* the law makes it the duty of the jury to convict."

Counsel's proposition to instruct the jury that the circumstantial evidence must not only be sufficient "to be inconsistent with any other rational *theory of innocence*" but must also be "sufficiently strong to set aside the presumption of innocence, and moreover to remove it beyond a reasonable doubt, *and that it was not inconsistent with any rational theory of innocence* they were bound to acquit him," seems to be founded on the theory that defendant was being tried to determine if he was innocent. Such was not the case. He was duly charged with being guilty. The jury were impanelled to determine whether or not he could be proved guilty, not whether he could be proved innocent. In the eyes of the law he was innocent until the jury determined him guilty from the evidence.

> "It was erroneous to give a charge which authorized an acquittal on a reasonable doubt of innocence instead of a reasonable doubt of guilt."
>
> 16 C. J. 993, Sec. 2401.

3. (Br. p. 40, ll. 19 to 23.) This is merely a mode of stating the doctrine of reasonable doubt and is in line with the authorities.

4. (Br. p. 40, ll. 25 to 31.) It is an extraordinary misconception of the language of the instruction which enables counsel to assert that the court therein stated that the "transactions mentioned in the indictment" had been "actually proved against" defendant. On other other hand the only rational construction of the language here is that the court was instructing the jury that the only purpose of the introduction of evidence of offenses other than those charged in the indictment was to show the intent of defendant, and this was to be applied only to such matters charged in the indictment as the jurors found had been proven. No error appears.

5. (Br. p. 41, ll. 11 to 23.) It is not according to the record, nor the fact that the court permitted evidence that certain amounts were charged to the profit and loss account of the bank as a circumstance for the jury to consider in determining whether appellant had been guilty of embezzlement or misapplication, or abstraction. The court told the jury when the evidence was offered and admitted just what he told them in this instruction, that this evidence was to be considered only to determine whether or not the bank's funds had been depleted. The ridiculous charge that the court thereby told the jury that such act by the bank was sufficient to justify the jury in coming

to the conclusion that plaintiff in error was responsible for such depletion is, of course, totally unsupported by the record. The evidence introduced as to each of the various transactions, before the introduction of the evidence to show the depletion, proved beyond any doubt that appellant was the only person responsible for the condition requiring restitution by the bank.

6. (Br. p. 42, l. 17 to p. 43, l. 33.) See authorities above cited under No. 1 of "demurrer," as to the matter of charging embezzlement, etc., of "moneys, funds and credits." The law does not make the value of the property any element of the offense and hence the proof of the value is immaterial.

7. (Br. p. 44, l. 1 to p. 45, l. 13.) We have met this position, *supra*. The statute specifically lays down that the offense is committed if defendant does the prohibited act "with intent * * * to deceive * * * any agent appointed to examine the affairs, etc."

8. (Br. p. 45, l. 15 to p. 46, l. 2.) The jury recalled the evidence which proved beyond a reasonable doubt that defendant had misapplied funds of bank. They convicted on counts 31 and 33.

9. (Br. p. 46, ll. 3 to 19.) Same as No. 7, *supra*.

10. (Br. p. 46, l. 20 to p. 48, l. 17.) The instruction correctly sets forth the law with regard to intent in such cases.

The intent to injure or defraud the bank within the meaning of the section does not necessarily involve malice or ill-will toward the bank, for the law pre-

sumes that a person intends the necessary and natural consequences of his acts, and it is sufficient that the wrongful or fraudulent act will necessarily injure or defraud the bank.

Agnew v. U. S., 165 U. S. 36;
U. S. v. Youtsey, 91 Fed. 864;
U. S. v. Allis, 73 Fed. 165;
Peters v. U. S., 94 Fed. 127;
U. S. v. Kenney, 90 Fed. 257;
U. S. v. Taintnor, 28 Fed. Cas. No. 16428;
Chadwick v. U. S., 141 Fed. 225, 242.

Proof of the act charged raises the inference of intent to injure or defraud the bank or to deceive and throws the burden of proof upon the defendant.

U. S. v. German, 115 Fed. 987.

Where false entries have a natural tendency to deceive the bank officers, the presumption of such intent cannot be rebutted by a denial thereof by the defendant:

U. S. v. Means, 42 Fed. 599.

How could intent be proven except by showing that the defendant knowingly performed certain acts the usual and ordinary results of which are deleterious, and deducing or presuming from such facts a criminal intent? No one can look into another's mind and read there the intent. The instruction is correct.

11. (Br. p. 48, l. 18 to p. 49, l. 22.) The instructions are right. Same authorities as in No. 10 above.

12. (Br. p. 49, l. 23 to p 5.0, l. 23.) The objection of counsel to this instruction is based upon the erroneous idea that an intent to injure and defraud the bank is necessary under section 5209. As explained above, the intent necessary for the violation of this act under the counts mentioned in the instruction was the intent to deceive the officers of the bank or the agent of the comptroller. It is not necessary that there be an intent to defraud. See authorities above cited.

13. (Br. p. 50, l. 24 to p. 53, l. 2.) There is "much cry and little wool" in the objections of counsel to this instruction. The testimony shows that Williams instructed the general bookkeeper that he had made a loan for M. B. Murphy and if any checks came in against Murphy's account Ingram was to see Williams first, that is, before the checks were refused payment because Murphy had not sufficient funds in the bank. In order to obey these instructions and to prevent the turning down of a check of Murphy's for this reason Ingram noted on the ledger sheet the words, "See Ingram in case of check." It is true, perhaps, that Williams did not tell Ingram to make the notation, but he did instruct him not to turn any checks down without first seeing him. If there is a slight inaccuracy in the statement of the court it is not prejudicial and the counsel for appellant did not take any exception thereto at the time.

14. (Br. p. 53, ll. 3 to 26.) The offered instruction, insofar as it correctly states the law, is covered by the instructions given by the court.

15. (Br. p. 53, l. 27 to p. 54, l. 23.) The court instructed the jury fully and correctly in regard to false entries and the point made by counsel, insofar as it correctly states the law, was fully covered.

16. (Br. p. 54, l. 24 to p. 55, l. 27.) The proposed instructions here set forth were fully covered in the instructions of the court insofar as they properly state the law.

17. (Br. p. 55, l. 28 to p. 56, l. 27.) We deny that there is any error prejudicial or otherwise in the comments of the court upon the evidence, and we deny that the comments of the judge are other than judicial and dispassionate. The jury was informed that they were the sole judges of the facts and of the weight and effect of the evidence, and there is no error in the record in this regard.

VII.

The Motion for New Trial and in Arrest of Judgment

1. The granting of a new trial is within the discretion of the trial court, and where there is evidence to support the verdict the denial of the motion is not reviewable on error:

Shepard v. U. S., 236 Fed. 73, 77;
Segna v. U. S. 218 Fed. 791, 792;
Collins v. U. S., 219 Fed. 670, 674;
Blitz v. U. S., 153 U. S. 312.

2. (Br. p. 57, ll. 3 to 13.) If the statement by the prosecuting attorney was error at all it was prejudicial to the Government and not to the defendant. The jurors were citizens of San Diego county and if the statement was an imputation such imputation was to the very jurors themselves. There could be no prejudice to the defendant by this remark.

3. (Br. p. 57, l. 17 to p. 58, l. 22.) In the case of Caminetti v. United States, 242 U. S. 470, 494, sustaining the Circuit Court of Appeals for the Ninth Circuit, the court said:

> "We think the better reason supports the view sustained in the Court of Appeals in this case, which is that where the accused takes the stand in his own behalf and voluntarily testifies for himself he may not stop short in his testimony by omitting and failing to explain incriminating circumstances and events already in evidence, in which he participated and concerning which he is fully informed, without subjecting his silence to the inferences to be naturally drawn from it."

This decision was rendered in sustaining an instruction of the court, to the following effect:

> "A defendant is not required under the law to take the witness stand. He cannot be compelled to testify at all, and if he fails to do so, no inference unfavorable to him may be drawn from that fact, nor is the prosecution permitted in that case to comment unfavorably upon the defendant's silence; but where a defendant elects to go upon the witness stand and testify, he then

subjects himself to the same rule as that applying to any other witness, and if he has failed to deny or explain acts of an incriminating nature that the evidence of the prosecution tends to establish against him, such failure may not only be commented upon, but may be considered by the jury with all other circumstances in reaching their conclusion as to his guilt or innocence; since it is a legitimate inference that, could he have truthfully denied or explained the incriminating evidence against him, he would have done so."

This court made an exhaustive review of the authorities in deciding this case (Diggs, Caminetti v. U. S., 220 Fed. 545, 548 *et seq.*) and the prosecutor had these cases in view when making the comments complained of.

4. (Br. p. 58, l. 22 to p. 62, l. 11.) The court instructed the jury that they were to determine the case upon the evidence introduced before them by the witnesses and not upon statements of counsel. If there were erroneous statements by the prosecuting attorney they would be cured by the instructions:

Holt v. U. S., 218 U. S. 245, 250.

The record discloses that at the time of the colloquy complained of the court was busy writing and did not hear what was said by counsel. When his attention was called no statement was made to him of what had been said, no request was made for an instruction to the jury to disregard the statements, and the court did not rule upon the question for this reason. No

exception was taken. No error can be predicated upon such a record.

Diggs v. U. S. 220 Fed. 545, 554.

5. (Br. p. 62, l. 12 to p. 63, l. 31.) These are the same matters referred to in the previous number (4) and the same authority disposes of them.

6. (Br. p. 64, l. 1 to p. 66, l. 22.) There is no prejudicial error shown in any of these matters. Counsel and prisoner were both present at the time that the custodians of the jury were sworn to take charge of the jury and they were familiar with the former proceedings and with the testimony of the custodians in regard to their knowledge of the case, and no objection was made to these men as custodians, and no objection was made at any time to them acting as custodians until long after the verdict, at the time of the motion for a new trial. The court below believed that there was no prejudice resulted to the defendant and so held.

In the case of Holt v. United States, *supra*, at page 250, the court held as follows:

> "We will take up in this connection another matter not excepted to, but made one of the grounds for demanding a new trial, and also some of its alleged consequences, because they also involve the question how far the jury lawfully may be trusted to do their duty when the judge is satisfied that they are worthy of the trust. The jurymen were allowed to separate during the trial,

always being cautioned by the judge to refrain from talking about the case with anyone, and to avoid receiving any impression as to the merits except from the proceedings of the court. The counsel for the prisoner filed his own affidavit that members of the jury had stated to him that they had read the Seattle daily papers with articles on the case, while the trial was going on. He set forth articles contained in those papers, and moved for a new trial. The court refused to receive counter-affidavits, but, assuming in favor of the prisoner that the jurors had read the articles, he denied the motion. This court could not make that assumption if the result would be to order a new trial, but the probability that jurors, if allowed to separate, will see something of the public prints, is so obvious, that, for the purpose of passing on the permission to separate, it may be assumed that they did so in this case * * *. If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain a jury trial under the conditions of the present day."

7. (Br. p. 66, l. 23 to p. 74, l. 5.) This court will not consider the sufficiency of the evidence to sustain the verdict.

"The alleged fact that the verdict was against the weight of evidence we are precluded from considering if there was any evidence proper to go to the jury in support of the verdict. Crumpton v. United States, 138 U. S. 361; Moore v. United States, 150 U. S. 57, 61."

Humes v. U. S., 170 U. S. 210, 213;

Tapack v. U. S. 220 Fed. 445, 448.

VIII.

Conclusion.

In considering this case and the very great number of objections that have been raised to the sufficiency of the indictment it is well to keep in mind the fact that the sentence of the defendant was for five years upon each of the counts upon which he was convicted, the said time to run upon all of said counts concurrently; so that his sentence is not longer than might have been given him upon conviction on a single count. It is the well-settled law that if any count of the indictment is good, under the circumstances as above suggested, the sentence will stand:

Claasen v. U. S., 142 U. S. 140;
Flickinger v. U. S., 150 Fed. 1, 2;
Aczel v. U. S., 232 Fed. 652.

Where sentence imposed on a defendant convicted on a number of counts was no greater than might have been imposed on any single count, if he was properly convicted of one of the offenses charged, error with respect to the others is not ground for reversal.

Baird v. U. S. 196 Fed. 778.

This applies to the instructions.

Morse v. U. S., 174 Fed. 539;
Certorari denied, 215 U. S. 605;
Hartman v. U. S., 168 Fed. 30;
Goll v. U. S., 151 Fed. 412.

The appellant had a most fair and impartial trial. It was in his home town, among his personal friends, and some of his personal friends were members of the jury which tried him. The prosecution, after exhausting its peremptory challenges, challenged one of the jurors who testified that he was a personal friend and neighbor of appellant, living very near him for many years, for favor. But the court disallowed the challenge, and the prosecution had to proceed with this juror in the panel, prejudiced in appellant's favor and with the distaste for the prosecution that such a challenge would naturally create. Appellant was defended by the counsel of his choice. The court was a personal acquaintance of appellant whose feeling for appellant is aptly shown in the brief, page 73, line 24 to page 74, line 1. Appellant had every opportunity to clear himself from these charges if they were false. In spite of all these advantages, the testimony of guilt adduced was so overwhelming that he was convicted upon nine of the counts. There is no prejudicial error in the record. The judgment should be affirmed.

Respectfully submitted,

J. Robert O'Connor,
United States Attorney.

Wm. Fleet Palmer,
Special Assistant United States Attorney.

No. 3579.

IN THE

United States
Circuit Court of Appeals,

FOR THE NINTH CIRCUIT.

Charles L. Williams,
Plaintiff in Error,
vs.
United States of America,
Defendant in Error.

ARGUMENT OF DEFENDANT IN ERROR.

J. Robert O'Connor,
United States Attorney;
Wm. Fleet Palmer,
Special Assistant United States Attorney.

Parker & Stone Co., Law Printers, 232 New High St., Los Angeles, Cal.

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ARGUMENT OF DEFENDANT IN ERROR.

The court having granted leave, defendant in error submits the following:

1. The withdrawal of appellant's third ground of motion to quash, referred to on page 7 of defendant in error's brief, will be found in Trans. Vol. II, p. 304.

2. The citation on page 7 of our brief, "Agnew v. U. S., 165, 36" should be 165 U. S. 36.

3. The reference on page 7 of our brief to "section 277 of the Revised Statutes of the United States" should be section 277 of the Federal Judicial Code.

4. The testimony of Charles N. Williams, clerk of the District Court, showing the entire regularity of the

drawing and organization of the grand jury is contained in Trans. Vol. II, page 712 *et seq.*

The statement of Judge Bledsoe in regard to drawing of juries is set out in Tr. Vol. II, p. 713.

Section 276 of the Federal Judicial Code, as amended February 3, 1917, provides that the clerk, or his deputy, and jury commissioner shall place names of qualified persons in the jury box. Their duty in this regard is fixed by the statute, not by an order of court.

United States v. Murphy, 224 Fed. 554, 564;
Dunn v. U. S., 238 Fed. 508, 510;
Apgar v. U. S., 255 Fed. 16, 17 *et seq.;*
U. S. v. Caplis, 257 Fed. 840, 841.

5. To the point that the intent to deceive an agent appointed to examine the affairs of the bank is an offense under section 5209 R. S., add to the authorities cited in our brief, page 22, the following:

Billingsley v. U. S., 178 Fed. 653, 658;
U. S. v. Norton, 188 Fed. 256;
Richardson v. U. S., 181 Fed. 1;
Grant v. U. S., 268 Fed. 443, 445.

6. Plaintiff in error's brief, p. 27, line 23, to p. 28, line 33, relates to testimony of Charles K. Voorhees and was addressed to counts 2 and 3 of the indictment charging misapplication. The jury disagreed on these counts, there is no appeal pending as to them, and consequently there can be no prejudicial error. [Tr. Vol. I, pp. 227 to 229.]

7. Appellant's brief (p. 29, l. 1 to p. 32, l. 6) refers to rulings upon evidence addressed solely to counts 9, 10, 12, 13 and 14, the De Nelson Smith transaction. The jury disagreed as to each of these. No prejudicial error. [Tr. Vol. I, pp. 239 to 254.]

8. Appellant's brief, p. 32, ll. 8 to 20, concerns a memorandum charge of the bank showing that the bank paid to Russell Williams the $5000 charged to have been embezzled by appellant in counts 34 ($2000) and 35 ($3000). The court correctly limited the testimony's effect to showing that the bank paid the money, —the depletion of the bank's funds. [U. S. Ex. 88, Tr. Vol. I, pp. 273-4.]

9. Appellant's brief, p. 32, ll. 23 to 29, this evidence was properly admitted to prove the depletion of the bank's earnings account. [Tr. Vol. I, pp. 274-5.]

10. Appellant's brief, p. 32, l. 32 to p. 33, l. 2, was properly admitted to supplement the testimony which showed that appellant had deposited the Russell Williams checks for $2000 and $3000, respectively, in his own private account. [Tr. Vol. I, pp. 274 to 276.]

11. Appellant's brief, p. 33, ll. 5 to 16, this was proper redirect examination to the cunning cross-examination of Russell Easom, which consisted in asking the witness whether he could tell, from the deposit ticket *alone,* or from the check *alone,* or from his teller sheets *alone,* or from William's account *alone,* etc., whether or not the Russell Williams check for $2000 had been deposited in appellant's private account. This

character of cross-examination was intended, evidently, to lay the foundation for a doubt in friendly minds, and the redirect was to develop the fact that no such suggested doubt could be a reasonable doubt. [Tr. Vol. I, p. 288.]

12. Appellant's brief, p. 33, l. 19 to p. 34, l. 22, is addressed to a reading of a portion of appellant's testimony given in his own behalf at a former trial of the same indictment. [Tr. Vol. I, pp. 320 to 322.] This testimony set out in the brief was regarding the "Von Tesmar transaction." This transaction was involved in counts 27, 28, 29 and 30 of the indictment. The jury disagreed as to each of these counts. Therefore the error, if any, was not prejudicial. But the admission of the testimony of a defendant given by him in his own behalf in a former trial is not error. It is proper evidence.

Wharton's Crim. Ev. § 664;

16 C. J. p. 569, § 1106, and p. 630, §§ 1250, 1251, 1252, 1253;

Powers v. U. S., 223 U. S. 303, 311, 56 L. Ed. 452.

13. Appellant's brief, p. 34, l. 25 to p. 35, l. 6, was in relation to count 22, the Agnes Gillen transaction. In this there was conviction. [Tr. Vol. I, pp. 320, 322.]

Agnes Gillen had an account at the bank in which there was more than $14,000. The balance had been more than $10,000 for many years. She had a special contract with appellant for a high rate of interest to

be paid to her upon this balance by the bank. Ten thousand dollars of this amount was withdrawn from this account without the knowledge or consent of Mrs. Gillen. The bank's books showed this account with the $10,000 out. But the pass book of Mrs. Gillen was balanced by appellant every time but once, after the withdrawal of the $10,000, and the balance set down in his own hand and each of these balances showed the $10,000 remaining in her account. One time the account was balanced by Mrs. Johnston O. Miller, an employee, and the correct balance was set down in the pass book as it appeared on the bank's ledger, showing $804.21. But before the pass book was delivered to Mrs. Gillen the figures 10 were set before this balance, making the pass book show the balance as $10,804.21. The 10 looked like the figures of appellant. On the ledger sheet containing the account of Mrs. Gillen there was twpewritten in red ink the following: "If this acct. goes over, pay all checks and DO NOT notify. C. L. Williams, V. P. 4/21/15." But because the government was unable to produce a witness who could testify that these words were placed there at a time when appellant was connected with the bank the court struck out those words and directed the jury not to consider them. $9000 was drawn out of this account Dec. 18, 1914, and $1000 Feb. 26, 1915. Appellant wrote Joseph W. Sefton, after he retired from the bank and while trying to settle up his affairs, as follows:

"Joe:

If they have credited my special a/c with the funds just charge it with $10,000 & credit to a/c of Mrs.

Gillen & that will settle with her. I have note in my possession payable to her. * * *." (U. S. Exhibit 18.)

And appellant placed an item of "Gillen 10,000" among his liabilities in U. S. Ex. No. 21. [Tr. Vol. V., p. 1503.]

Mrs. Gillen never authorized appellant to make any loan for her, or to invest in any note, or to withdraw any sum whatever from her account. The testimony of Mrs. Gillen of which complaint is here made was proper to show that her pass book was not delivered to her with the balance showing $804.21, and that there was a controversy as to her account, or a discrepancy. The court specially limited this testimony to the single point of showing the existence of the controversy. [Tr. Vol. . . ., p. . . ., l. . . .]

The bank was compelled to repay this $10,000 to Mrs. Gillen. Appellant never produced the note spoken of in the above letter.

There was no error in the court's ruling.

14. Appellant's brief, p. 35, l. 9 to p. 36, l. 23, was as to testimony of another offense to go to the question of intent only, and the court specially limited its effect to that purpose. The evidence showed that the bank's cash reserve was below the legal requirements, and that only July 28, 1914, the bank promised to make good the deficiency. (U. S. Exhibit No. 206.) That a call from the comptroller for the bank's condition on October 31, 1914, was made and became known to the bank

November 4, 1914. That on the day that the call became known, Nov. 4, 1914, appellant made out a deposit ticket for $40,000 in the name of J. W. Sefton, Jr., dated it October 31, 1914, and caused the bank's books to be erased and altered so as to show $40,000 more cash on hand as of October 31, 1914, and this false deposit and entry was carried into the bank's report. November 11, 1914, appellant drew a check in Sefton's name for the $40,000 and closed this account. (U. S. Ex. No. 139.) Mr. Sefton knew nothing whatever of this transaction, never deposited or drew out any of this money, or authorized appellant to do any business for him, or in his name, nor to sign his name to any check. [Tr. Vol. . . ., p. . . .]

Such testimony is admissible to show intent.

16 C. J., p. 589, § 1137;
Schultz v. U. S., 200 Fed. 234, 236;
Moffatt v. U. S., 232 Fed. 522, 533.

15. Appellant's brief, p. 37, ll. 11 to 24, refers to the Gillen matter (No. 13 *supra*). It merely proved that the bank's books showed the withdrawal of the $10,000 from the Gillen account. This was, of course, perfectly competent and relevant to prove that the report based upon the bank's books showed $10,000 less than the true sum. [Tr. Vol. II, p. 443.]

16. Appellant's brief, p. 38, ll. 28 to 33, objects to a portion of the instructions. The instruction relates to the enforcement of law and is entirely proper.

And p. 39, ll. 2 to 7, was merely to leave the jury free to consider the guilt or innocence of the defendant rather than the punishment he might receive if found guilty. This was proper.

17. Appellant's brief, p. 40, ll. 20 to 23, objects to an instruction that the jury is to decide upon the "strong probabilities of the case, but to justify a conviction the probabilities must be so strong as not to exclude all doubt or possibility thereof, but as to exclude reasonable doubt. As long as you have a reasonable doubt of the defendant's guilt, you may not find him guiltv." This language was approved in

Dunbar v. U. S., 156 U. S. 185, 199, 39 L. ed. 390;
Bacon v. U. S., 97 Fed. 35, 44;
Ammerman v. U. S., 262 Fed. 125;
Wilson v. U. S., 232 U. S. 570.

18. We cite authorities in support of No. 6 p. 31 of our brief as follows:

U. S. v. Harper, 33 Fed. 471, 476;
Phillips v. U. S., 201 Fed. 259, 262;
G. R. & I. Ry. Co. v. U. S., 212 U. S., 577, 582;
Daniels v. U. S., 196 Fed. 459, 464;
Wharton Crim. Ev. (9th ed.) Sec. 126.

19. Additional authorities to No. 10, p. 31 of our brief, that person intends necessary and natural consequences of his acts.

Allen v. U. S., 164 U. S. 492, 496, 41 L. ed. 528;
Kirchner v. U. S., 255 Fed. 301, 305.

20. We cite in support of No. 15, p. 34 of our brief, the following:

> "It cannot be the law that officers of a bank may make a sham entry with the intent to deceive, and yet, merely because they go through the idle and deceitful form of making a transaction to which the entry might nominally but cannot really relate, protect themselves from the consequences of their real conduct. Such a holding would facilitate the vicious practice condemned by the law."
>
> Billingsley v. U. S., 178 Fed. 653, 663;
>
> Hayes v. U. S., 169 Fed. 101.

21. We cite in further support of No. 3, p. 35 of our brief, commenting on failure of defendant, who took the witness stand in his own behalf, to testify fully.

> Le More v. U. S., 253 Fed. 887, 897.

21½. In support of No. 4, p. 36 of our brief, we cite:

> Gilmore v. U. S., 268 Fed. 719, 721.

22. Appellant's brief, p. 64, l. 1 to p. 66, l. 22; we cite additional authority to support No. 6, p. 37 of our brief:

> "The denial of a motion for new trial in the federal courts is within the discretion of the court, and where that discretion has been exercised, and there is evidence to support the judgment, as in this case, a motion is not reviewable on a writ of error."
>
> C. M. & St. P. Ry. Co. v. Chamberlain, 253 Fed. 429, 431.

In the case of Mattox v. U. S., 146 U. S. 140, 152, 36 L. ed. 917, 921, the error was in refusing to receive and consider defendant's affidavits,—in refusing to exercise the discretion vested in the court by law.

In Holmgren v. U. S., 217 U. S. 509, 522, 54 L. ed. 861, 867, the indictment was allowed to be taken to the jury room with an indorsement that defendant had been convicted on one of the counts. The court held that the record contained all the evidence and was ample to sustain the conviction of defendant without giving effect to the indorsement on the indictment and new trial was refused. The court below had considered the matter and exercised its discretion.

In Chambers v. U. S., 237 Fed. 513, 520, the custodian of the jury talked with the jury about what punishment the court would probably inflict if a verdict of guilty was returned. The court considered the matter and decided that defendant was not prejudiced. This was held to be an exercise of the discretion vested in the court, and, it was upheld.

The affidavits of appellant show only that one of the custodians talked to members of the jury while eating. This is no showing of prejudice. No attempt is made to show what was said. Under section 269 of the Federal Judicial Code as amended Feb. 26, 1919, it was appellant's duty to show prejudice. In this he failed, and the court below ruled correctly.

23. Appellant claims to set out certain facts proved by the *undisputed* evidence in regard to the Murphy transaction in brief, p. 66, l. 27 to p. 70, l. 31.

The true record of these transactions will be found in the transcript. The testimony shows:

a. Williams was vice president and manager of the bank, The American National. [Tr. Vol. . . ., p. . . . .]

b. M. B. Murphy became acquainted with him and trusted him. [Tr. Vol. . . ., p. . . .]

c. Murphy was sick and unable to attend to business. [Tr. Vol. . . ., p. . . .]

d. Murphy sent his daughter Anna to Williams to open a savings account to be formed from Murphy's checking account already in the bank and a check for $3500. [Tr. Vol. . . ., p. . . . .]

e. Williams wrote, at Anna's request, a check on the checking account for $23,000, May 5, 1916 (U. S. Ex. 6.) and received this check and the $3500 check, a total of $26,500. Williams made out a pass book to M. B. Murphy, time account No. 1436 (U. S. Ex. 5) for the $26,500, and delivered it to Anna for her father. At the same time he made out a deposit ticket for $6500 (U. S. Ex. 7) and caused that to be entered on the bank's books as Time Account No. 1436 (U. S. Ex. 8) in Murphy's name. [Tr. Vol. . . ., p. . . .]

f. On the same day (May 5, '16) Williams caused a note for $20,000 signed by M. D. Goodbody, to be entered on the bank's collection register as the property of M. B. Murphy (U. S. Ex. 14). This note (U. S. Ex. 13) was dated July 1, 1915, due four months after date, made to American National Bank of San Diego, signed by M. D. Goodbody, with seven per cent interest,

and indorsed "Without recourse, American National Bank, San Diego." It was seven months overdue at the time Williams "made a loan" for Mr. Murphy. Goodbody then owed the bank nearly $100,000. He was insolvent and Williams was conducting the financial end of Goodbody's business, and was of course, familiar with his insolvency. [Tr. Vol. . . ., p. . . .]

g. The evidence is that the $20,000 Goodbody note never was listed as one of the bills receivable of the American National Bank. [Tr. Vol. . . ., p. . . .]

h. Williams says it was carried as a "cash item" but there is no book, nor paper, nor witness to sustain that. [Tr. Vol. . . ., p. . . .]

i. Williams now claims he took the Goodbody $20,000 note out of cash items and put $20,000 of Murphy's money into the bank in its place. But there is no witness, nor book, nor record, nor paper to support that claim. On the other hand, Williams acknowledged to F. J. Belcher that he told Murphy he would put the $20,000 back into Murphy's account and had not done so because he never had had the money to do it with. Williams made several statements of his assets and liabilities at the time of his withdrawal from the bank, and in each he included the $20,000 Murphy item as a personal liability. (See U. S. Exs. 20, 21, 22,) [Tr. Vol. . . ., p. . . .]

j. The consolidated bank under the name of First National Bank of San Diego was compelled to pay and did pay this $20,000 to Mr. Murphy. [Tr. Vol. . . ., p. . . .]

k. Williams drew checks against Goodbody's account at the rate of four per cent. The note called for interest at seven per cent. [Tr. Vol. . . ., p. . . .]

l. Williams instructed H. J. Ingram, bookkeeper of the bank, that if any checks came in on the Murphy account to see Williams first, before turning them down for want of funds. [Tr. Vol. . . ., p. . . .]

Mr. Williams never asked Murphy about the loan until six months after it was made. Murphy told him to put the money back in his account, and Williams promised to do so, but never did, because, as he told Mr. Belcher, he never had the money to put back. [Tr. Vol. . . ., p. . . .]

This evidence is so overwhelming—tracing the $20,000 to the personal possession of Williams; showing the false entries in the books; the attempt to guard against discovery by instructions to the bookkeeper; the attempt to palm off on the aged and sick Mr. Murphy a worthless note, possibly hoping he would die and afford Williams a means of escape; the promise to Murphy to replace the money and the failure so to do, the acknowledgment in three different papers that he owed Murphy this money—that it is really inconceivable how counsel can claim there is nothing in the record to warrant a conviction of embezzlement. The fact is demonstrated in writing, and the writing is made by the defendant's own hand.

24. Appellan't brief, p. 70, l. 27 to p. 71, l. 16, deals with count 22, which charged a false entry in a report

to the comptroller, the said report reflecting the false entry of $10,000 less under the head "Individual Deposits ,subject to check," in the column devoted to liabilities, being item number 33 of the report made May 13th, 1916, of the condition of the bank May 1, 1916, than was the true amount because defendant had unlawfully withdrawn $10,000 from the account of Agnes Gillen. (See No. 13 *supra.*)

It is objected that there is a variance between the allegation and the proof.

Count 22, after alleging certain formal matters charges:

"That said Banking Association on the 13th day of May, 1916, then and there made and transmitted to the then comptroller of the currency of the United States a certain report of the condition of the said Banking Association at the close of business on the 1st day of May, 1916, according to a certain form theretofore prescribed by the comptroller of the currency of the United States for the time being, the same being a report which was then and there, to-wit: on the said first day of May, 1916, and said 13th day of May, 1916, by law the duty of the said Banking Association to make and transmit to the said comptroller and which said report was then and there verified by the oath of the said association and attested by the signature of three of the then directors thereof, of which three attesting directors the said Charles L. Williams was one.

"And the grand jurors aforesaid upon their oath aforesaid do further present that the said Charles L. Williams, being director, agent and so being also such vice-president of the said Banking Association on the

said 13th day of May, 1916, within the city of San Diego, county, state, district and division aforesaid, unlawfully did knowingly and feloniously make and cause to be made a certain false entry in the said report so made as aforesaid, under the head of 'Individual Deposits, subject to check,' in the column devoted to liabilities, being item number 33 of said report, as follows, 1,509,993.19, that is to say, a false entry to the effect that at the close of business on the said 1st day of March, 1916, the said Banking Association's liability on individual deposits subject to check was $1,509,-993.19, whereas in truth and in fact ,as he, the said Charles L. Williams at the time of so making and causing to be made the said false entry well knew the liability of the said Banking Association on individual deposits subject to check on the first day of May, 1916, was $10,000.00 greater than the said sum of $1,509,-993.19, as he, the said Charles L. Williams then and there well knew, and the said Charles L. Williams at the time he so made and caused to be made the aforesaid false entry did so with the intent then and there to deceive any agent of the comptroller of the currency appointed to examine the affairs of said banking association." [Tr. Vol. I, pp. 47 to 49.]

The report introduced to support this charge (U. S. Ex. 66) a photostatic copy of which was filed with the clerk on the day of argument by leave of court, fulfilled all of the allegations with reference thereto except that it was not signed by Charles L. Williams. The allegation that it was so signed is mere surplusage and may be disregarded. It need not be proved.

Wharton Crim. Pleading and Practice (9th ed.) Sec. 180;

Wharton Crim. Ev. (9th ed.) Sec. 138.

It is not made an offense under section 5209 R. S., or under the banking laws to falsely attest or verify a report; the offense consists in making or causing to be made a false entry therein. The offense charged against Williams is making and causing to be made the false entry in a report of May 13, 1916. The offense is minutely charged and the proof sustains the allegations. There is no variance.

Cochran v. U. S., 157 U. S. 286, 292, 39 L. ed. 704, 706;

U. S. v. Herrig, 204 Fed. 124, 125.

> "Defendant contends that there is no evidence showing that he personally directed the repetition of these false entries. * * * The original entries were of such a character and made for such a purpose that an inference is reasonable, if not quite irresistible, that their subsequent repetitions was for the sole purpose of carrying out the original design to deceive. There is in our opinion substantial evidence that defendant knew and intended that his subordinates would continue to make the false entries which he had originally authorized until he should give directions to the contrary. The question of the authorship or responsibility for the repeated entries was fairly left to the jury, and its affirmative finding on that issue we think is supported by substantial proof."
>
> Billingsley v. U. S., 178 Fed. 653, 662.

Defendant was held guilty of causing false entry where he made a false deposit slip from which other employees made the false entry in the case of

Agnew v. U. S., 165 U. S. 36, 41 L. ed. 624.

25. Appellant's brief, p. 71, l. 17 to p. 72, l. 18, is based upon a misconception. It is not alleged in count 31 that the notes were misapplied with the sole intent to injure *only,* nor in count 33 with the sole intent to deceive *only*. It is easily conceivable that a man might, by misapplying notes, intend to defraud, to deceive and to injure. The matter of the knowledge or consent of the bank is fully treated in our brief, page 12, No. 2.

26. Appellant's brief, p. 72, l. 19 to p. 73, l. 23, refers to the two Russell Williams transactions involved in counts 34 and 35, and upon which conviction was had.

The testimony regarding these transactions was to this effect:

Russell Williams went to appellant December 18, 1917, to get an investment for $2000. He delivered to appellant his check for $2000, payable to the American National Bank. (U. S. Ex. 83.) Appellant endorsed the check and deposited it in his personal account. He also gave Russell Williams a receipt for a "note of R. P. Shields, dated December 1st, 1917, for $2000" etc. (U. S. Ex. 84). No trace of such a note could be found. Appellant made out a deposit slip for the $2000 for his own account Dec. 18, 1917 (U. S. Ex. 90). At the time this deposit was made appellant's account was overdrawn $939.62. The amount so deposited was checked out in small amounts until on the 28th of December, 1917, the account was again overdrawn $102.70. This transaction is the one charged in count 34.

On January 11, 1918, the American National and First National Bank of San Diego having been consolidated in the meantime and appellant made president of the new bank, Russell Williams returned to appellant and arranged for an investment of $3000 additional. He made out his check payable to the First National Bank and delivered it to appellant (U. S. Ex. 85). The check was perforated as paid, but it was not endorsed. Appellant executed a receipt to Russell Williams as follows: "San Diego, Cal., January 11, 1918. Received of Russell Williams $3000 for investment at 7% per annum from this date. C. L. Williams." (U. S. Ex. 86.) Appellant told Russell Williams he would invest the $3000 in a Shields note the same as the $2000 note, that is two notes, one for $2000 and one for $3000, On January 11, 1918, appellant deposited the $3000 Russell Williams check in his personal account, making out the deposit slip with his own hand. (U. S. Ex. 91.) Before and at the time of this deposit appellant's account had a balance of but $262.85. The account as augmented by the Russell Williams $3000 was paid out on small checks until on January 21st, 1918, there remained but $141.54.

In appellant's statement of liabilities and assets (U. S. Ex. No. 21) he placed an item of $5000 due Russell Williams. [See Tr. Vol. . . ., p. . . .]

There were other evasions and deceits of appellant in this matter, but the testimony was so strong as to be a practical mathematical demonstration of the embezzlement of these two sums by appellant.

The First National Bank had to and did pay this $5000 to Russell Williams. [Tr. Vol. . . ., p. . . .]

27. We desire to cite the following in addition to No. 7, page 38 of our brief:

> "There was no demurrer to the evidence, nor request for an instructed verdict. In the absence of apparent injustice court will not consider insufficiency of the evidence."
>
> Holland v. U. S., 268 Fed. 244, 245;
>
> Sturtz v. U. S., 268 Fed. 350, 351;
>
> Ramsey v. U. S., 268 Fed. 825, 826.

28. "Whether prejudice results from the erroneous admission of evidence at a trial is a question that should not be considered abstractly or by way of detachment. The question is one of practical effect, when the trial as a whole and all the circumstances of the proofs are regarded."

Williams v. U. S., 265 Fed. 625;

Smith v. U. S., 267 Fed. 665, 670.

29. We cite, in addition to authorities under the first paragraph of "Conclusion," page 39, the following:

Abrams v. U. S., 250 U. S. 616, 619;

Grant v. U. S., 268 Fed. 443, 444.

30. We cite, under No. 1, p. 11, at page 23, the following:

Billingsley v. U. S., 178 Fed. 653, 658;

U. S. v. Norton, 188 Fed. 256;

Richardson v. U. S., 181 Fed. 1;

Grant v. U. S., 268 Fed. 443, 445;
U. S. v. Mulligan, 268 Fed. 893, 897.

31. It was claimed in argument of counsel that the indictment was defective because it was not alleged that the bank was a "Federal Reserve Bank" or a "Member Bank" as provided in the amendment of section 5209, Sept. 26, 1918, 40 Stat., c. 177, Sec. 7, 1919 Sup. Comp. Stat. Sec. 9772. When the offenses were committed this amendment had not been adopted. The last offense charged is of January 11, 1918, count 35. The amendatory act reads that this section and 5208 "be and the same are hereby amended and *reenacted* to read as follows:"

This matter is fully disposed of by section 13 of the Revised Statutes of the United States, which is a general saving clause, and reads as follows:

> "The repeal of any statute shall not have the effect to release or extinguish any penalty, forfeiture or liability, incurred under such statute, unless the repealing act shall so expressly provide, and such statute shall be treated as still remaining in force for the purpose of sustaining any proper action or prosecution for the enforcement of such penalty, forfeiture or liability."

Hertz v. Woodman, 218 U. S. 205, 54 L. ed. 1001;
Goublin v. U. S., 261 Fed. 5.

The amendatory act contains no repealing clause whatever. In addition to this, the "member banks" are

yet known as national banks and are organized under and by virtue of the "National Bank Act" which is a law of the United States as alleged in the indictment.

See:

Comp. Stat., Secs. 9657 *et seq.*

Wm. Shapespeare has truly said:

"What's in a name?

"That which we call a rose, by any other name would smell as sweet." (Romeo and Juliet.)

Inasmuch as there has been no change in the organization of the banking association, and no change in its name, and its present name is now the same as that alleged in the indictment; and the banking association known as a national bank has become and is a "member bank" as was proven on the trial, there is nothing whatever to base the objection on. In other words, the description of the banking association as contained in the indictment, fits in every way the "member bank" described in the amended and re-enacted section 5209, as also the section before the amendment was made, and appellant could not be misled or prejudiced by such allegations.

32. We have been unable to secure a copy of the transcript in this case, or to have access to a copy for purposes of citation, and consequently cannot cite the transcript in support of our brief. At the time of the argument we got a few references on points argued by appellant and those we cite. We have attempted to

direct the attention of the court to the record by giving the number of the exhibits referred to, and we have cited appellant's brief so that the court may know to what point our argument is directed.

Conclusion.

The testimony in this case shows beyond doubt that the conviction of appellant was well merited. It is evident that he was not misled as to the issue because of any defect in the indictment. This was the second trial of the indictment and the evidence was the same in each case as to those counts upon which the government went to trial. There is no doubt that the indictment sufficiently describes the offenses to enable appellant to plead former jeopardy if he should be indicted for the same matters. There is no showing and no claim that appellant was prejudiced by any claimed defect in the indictment. Therefore the indictment is sufficient under section 1025 Revised Statutes.

U. S. v. Mulligan, 268 Fed. 893, 897.

February 26, 1919, Congress amended section 269 of the Federal Judicial Code (40 Stat. at Large, pt. 1, p. 1181, Comp. St. Ann. Supp. 1919, Sec. 1246) by adding the following:

> "On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before

> the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties."

In the celebrated case of Haywood v. U. S., 268 Fed. 795, 798, the Circuit Court of Appeals for the Seventh Circuit held, in referring to this amendment:

> "From this legislation we gather the congressional intent to end the practice of holding that an error requires the reversal of the judgment unless the opponent can affirmatively demonstrate from other parts of the record that the error was harmless, and now to demand that the complaining party show to the reviewing tribunal from the record as a whole that he has been denied some substantial right whereby he has been prevented from having a fair trial."

In the light of this amendment the unsubstantial structure of technicalities and quibblings erected in appellant's brief melts away like the frost picture on the window pane melts in the warm rays of the morning sun. The record does not disclose any substantial error. The trial was eminently fair and impartial. Defendant had every opportunity to show his innocence. He began in the bank when a boy, as janitor. He rose from messenger to bookkeeper, to teller, to assistant cashier, to cashier and manager, to vice-president and to president. He was thoroughly familiar with all the "ins and outs" of the business. He had access to the books. The government employees assisted him in ferreting out whatever he requested. His

treatment by court and prosecution was most considerate. There is no error pointed out, which, when you examine the overwhelming evidence of guilt, can be said to have prejudiced appellant in his defense.

The judgment should be affirmed.

Respectfully submitted,

J. ROBERT O'CONNOR,

United States Attorney;

WM. FLEET PALMER,

Special Assistant United States Attorney.

No. 3580

United States

Circuit Court of Appeals

For the Ninth Circuit.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

MIKE KOSO,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the United States District Court of the District of Arizona.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

No. 3580

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Names and Addresses of Attorneys of Record.

Messrs. FAVOUR & CORNICK, Prescott, Arizona,
Attorneys for Plaintiff in Error.

F. C. STRUCKMEYER, Esq., Phoenix, Arizona, and
R. B. WESTERVELT, Esq., Prescott, Arizona,
Attorneys for Defendant in Error.

In the District Court of the United States for the District of Arizona.

No. ——.

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Complaint.

Plaintiff complains of defendant and for cause of action alleges:

I.

That plaintiff is a citizen of the country of Finland, a province of Russia, and a resident of the State of Arizona, in said district. That defendant is a corporation duly organized, and at all times herein mentioned had, and now has, an office and an agent in Yavapai County, State of Arizona, in said district; owned, and now owns property, conducted, and now conducts business in said county, State and district.

II.

That defendant at all times herein mentioned was, and now is, engaged in the business of mining within the County of Yavapai, State and District aforesaid, owning, controlling and operating a certain mine known as the United Verde Extension Mine, located at or near the town of Jerome, Yavapai County, Arizona; that in the process of the development of said mine defendant caused to be excavated, established, built and maintained therein a main shaft, twelve hundred [1*] foot drift or level, and defendant constructed and maintained in said twelve hundred foot drift or level a track and mine car for the purpose of transferring loose rock and earth out of said twelve hundred foot drift or level to said main shaft.

III.

That on or about six-thirty (6:30) o'clock A. M. on December 15, 1917, plaintiff was employed by defendant and was engaged in the performance of work and labor for the defendant in shoveling certain loose rock and earth near the face of said twelve hundred foot drift or level into said mine car for the purpose of being transferred to said main shaft; and in performing said work plaintiff was using the appliance furnished by defendant for the performance of said work; that said work and labor being so performed by plaintiff for defendant was work and labor in or about the hazardous occupation of mining and within the scope of plaintiff's employment; and while so engaged in the regular course of said work plaintiff was injured by accident arising out of and

*Page-number appearing at foot of page of original certified Transcript of Record.

in the course of his said labor, service and employment, and due to a condition or conditions of such employment, and without negligence on his part, in the following manner, to wit: At about the abovementioned time plaintiff was working in said twelve hundred foot drift or level at a point near the face of said drift, and was engaged in shoveling loose rock and earth into said mine car as aforesaid, when certain large rocks and boulders fell from the roof of said drift, and struck plaintiff on his shoulders and back, and his left foot, knocking plaintiff down on the floor of said drift, and cut, bruised, broke and mangled plaintiff's shoulders, back and foot, and thereupon seriously, painfully, and permanently injured plaintiff. [2]

IV.

That as a proximate result of said accident, plaintiff's shoulders were made sore, and were crushed, mashed, broken and bruised, and plaintiff's back and spinal column was mashed, broken, bruised and permanently injured, and plaintiff's right kidney was made sore and inflamed, and plaintiff's left foot was cut and bruised, and plaintiff has thereby been deformed and permanently and irreparably injured; all to his great damage.

V.

That plaintiff has paid out and incurred liabilities for, and in the future will be compelled to pay out and incur liabilities for large sums of money for surgical aid, hospital fees, medicine, care, nursing and attention, and that he has had his ability and power to labor diminished; all to the great damage of the

plaintiff in the sum of Twenty-five Thousand ($25,000) Dollars, and for his costs herein.

(Sgn.) J. J. COX,
(Sgn.) A. Y. MOORE,
(Sgn.) L. J. COX,
Attys. for Plaintiff.

For a second cause of action, plaintiff reiterates all the allegations contained in paragraphs numbered I and II of his first cause of action, and in addition thereto alleges as follows:

III.

That plaintiff at the time of the injury hereinafter complained of was in the employ of defendant as mucker in defendant's said mine, and in this capacity his duties were to shovel loose rock and earth into said mine car, to be [3] transferred from near the face of said twelve hundred foot drift or level to the main shaft of said mine.

IV.

That on December 15, 1917, plaintiff was directed by defendant to shovel certain loose rock and earth near the face of said twelve hundred foot drift or level into said mine car; and at or about six-thirty (6:30) o'clock A. M. on said day, plaintiff was shoveling said loose rock and earth near the face of said twelve hundred foot drift or level into said mine car, when the roof of said twelve hundred foot drift or level, immediately over plaintiff's head, gave way, or caved in, and certain large rocks and boulders fell from said roof and struck plaintiff's back, shoulders and left leg, and greatly crushed, bruised, broke, mangled and lacerated plaintiff's said shoulders,

back and leg; that defendant then and there failed to provide this plaintiff a safe place in which to work, in this: Defendant negligently failed to timber said twelve hundred foot drift or level at the point where plaintiff was working, and said drift or level was negligently and unknown to plaintiff, left in an unsafe condition by reason of not having sufficient timbers therein to support the roof of said drift or level, and plaintiff alleges that, but for the negligence of defendant in this regard, plaintiff would not have received said injuries.

V.

That as the proximate result of said negligent acts of the defendant plaintiff's shoulders were cut, bruised and broken, and plaintiff's back was cut, bruised, mangled, lacerated and broken, and plaintiff's left leg was cut and bruised, and made sore, and plaintiff was thereby deformed and permanently injured; all to his great damage. [4]

That plaintiff has paid out, and incurred liabilities for, and in the future will be compelled to pay out and incur liabilities for large sums of money for surgical aid, hospital fees, medicine, care, nursing and attention, and that he has had his ability and power to labor diminished, and by reason of said injuries has suffered great mental pain and anguish and humiliation, and will continue to suffer for the remainder of his life; all to the great damage of the plaintiff in the sum of Twenty-five Thousand ($25,000) Dollars.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of Twenty-five Thousand ($25,000) Dollars, and his costs herein.

(Sgn.) J. J. COX,
(Sgn.) A. Y. MOORE,
(Sgn.) L. J. COX,
Attorneys for Plf.

[Endorsements]: No. 45 (Prescott). In the District Court of the United States for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Complaint. J J. Cox, A. Y. Moore, L. J. Cox, Attys. for Plaintiff. Filed Mar. 1, 1918. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [5]

UNITED STATES OF AMERICA.

District Court of the United States, District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Action brought in said District Court, and the Complaint filed in the office of the Clerk of said District Court, in the City of Phoenix, and County of Maricopa, on the Prescott side.

Summons.

The President of the United States of America, GREETING: To United Verde Extension Mining Company, a Corporation, Defendant:

YOU ARE HEREBY DIRECTED TO APPEAR and answer the complaint in an action entitled as above, brought against you in the District Court of the United States, in and for the District of Arizona, within 20 days after the service on you of this summons—if served within this county, or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said plaintiff will take judgment for any money or damages demanded in the complaint, as arising upon contract, or he will apply to the Court for any other relief demanded in the complaint.

WITNESS, the Honorable WILLIAM H. SAWTELLE, Judge of said District Court, this first day of March, in the year of our Lord one thousand nine hundred and eighteen and of our Independence the one hundred and forty-second.

[Seal of said Court] MOSE DRACHMAN,
Clerk.
By Nat T. McKee,
Deputy Clerk.

(MARSHAL'S RETURN.)

United States Marshal's Office,
District of Arizona.

I hereby certify that I received the within writ on the 2d day of March, 1918, and personally served

the same on the 4th day of March, 1918, upon United Verde Extension Mining Co., by delivering to and leaving with George Kingdon, Assistant General Manager of the above-named corporation, said defendant named therein personally, at the town of Jerome, [6] County of Yavapai, in said district, a certified copy thereof, together with a copy of the complaint, attached thereto.

J. P. DILLON,
U. S. Marshal.
By Harry Carlson,
Office Deputy.

March 27, 1918.

[Endorsements]: No. 45 (Prescott). U. S. District Court, District of Arizona. Mike Koso vs. United Verde Extension Mining Company, a Corporation. Summons. J. J. Cox, A. Y. Moore & L. J. Cox, Plaintiff's Attorneys. Filed Mar. 27, 1918. Mose Drachman, Clerk. By Benj. J. Kimber, Deputy Clerk. [7]

In the District Court of the United States for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Answer.

Comes now defendant, United Verde Extension Mining Company, a corporation, and answers plaintiff's complaint as follows:

DEMURRER TO WHOLE COMPLAINT.

Answering said complaint, defendant demurs to the whole thereof, on the ground that it appears upon the face of said complaint that two several causes of action, to wit, a cause of action *ex contractu* arising under Chapter VI of Title XIV of the Civil Code, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, and a cause of action *ex delicto* arising under the common law, are improperly united in said complaint.

WHEREFORE, defendant prays judgment as to the sufficiency of said complaint, and for its costs.

(Sgn.) ELLINWOOD & ROSS,
Attorneys for Defendant. [8]

DEMURRER TO FIRST CAUSE OF ACTION.

Further answering said complaint, but without waiving its foregoing demurrer to the whole thereof, defendant demurs to the first cause of action therein stated on the following grounds, to wit:

I.

That it appears upon the face of said complaint that the facts stated in said first cause of action are not sufficient to constitute a cause of action against defendant.

II.

That it appears upon the face of said complaint that plaintiff seeks in said first cause of action to

recover a judgment for damages against defendant under and by virtue of the provisions of Chapter VI of Title XVI of the Civil Code, Revised Statutes of Arizona, 1913, known as the Employers' Liability Law, enacted pursuant to the provisions of section VII of Article XVIII of the Constitution of the State of Arizona, without any charge or showing of negligence, wrong or default on the part of defendant causing or contributing to plaintiff's alleged injury and that said Employers' Liability Law and said Section VII of Article XVIII of the Constitution of the State of Arizona, are in contravention and violation of the Constitution of the United States, and particularly of the Fourteenth Amendment thereto, in that they seek to deprive defendant of its property without due process of law and to deny it the equal protection of the laws of [9] the State of Arizona, by subjecting it to unlimited liability for damages for personal injuries suffered by its employee without any negligence, wrong or default on the part of defendant causing or contributing to such injuries, and that for the reasons in this paragraph set forth, said complaint does not state facts sufficient to constitute a cause of action against defendant.

WHEREFORE, defendant prays judgment as to the sufficiency of said first cause of action, and for its costs.

(Sgn.) ELLINWOOD & ROSS,
Attorneys for Defendant.

PLEA IN BAR OF FIRST CAUSE OF ACTION.

Further answering said complaint, but without waiving its foregoing demurrers, or either of them, defendant admits the allegations of paragraph I of said first cause of action, and denies each and every, all and singular, the remaining allegations in said first cause of action contained.

WHEREFORE, having fully answered said first cause of action, defendant prays that plaintiff take nothing thereby, and that defendant have and recover its costs herein expended.

(Sgn.) ELLINWOOD & ROSS,
Attorneys for Defendant.

DEMURRER TO SECOND CAUSE OF ACTION.

Further answering said complaint, but without waiving its foregoing demurrer to the whole thereof, defendant demurs to the second cause of action therein stated, on the ground that it appears upon the face of [10] said complaint that the facts stated in said second cause of action are not sufficient to constitute a cause of action against defendant.

WHEREFORE, defendant prays judgment as to the sufficiency of said second cause of action, and for its costs.

(Sgn.) ELLINWOOD & ROSS,
Attorneys for Defendant.

PLEA IN BAR OF SECOND CAUSE OF ACTION.

Further answering said complaint, but without waiving its foregoing demurrers, or either of them, defendant admits the allegations of paragraph I of said first cause of action, incorporated into and made

a part of said second cause of action, and denies each and every, all and singular the remaining allegations in said second cause of action contained.

WHEREFORE, having fully answered said second cause of action defendant prays that plaintiff take nothing hereby, and that defendant have and recover its costs herein expended.

(Sgn.) ELLINWOOD & ROSS,
Attorneys for Defendant.

[Endorsements]: No. 45—(Prescott). In the District Court of the United States for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Answer. Service of a copy of the within answer is admitted this 21st day of March, 1918. Cox, Moore & Cox, Attorneys for Plaintiff. Filed March 22d, 1918. Mose Drachman, Clerk. By Nat T. McKee, Deputy. [11]

In the District Court of the United States for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Motion for Security for Costs.

Comes now the above-named defendant and respectfully moves the Court to require plaintiff in the above-entitled action to furnish a good and sufficient cost bond or security for costs, in a reasonable sum to be fixed by the Court, and that the Court make order accordingly.

(Sgn.) A. H. FAVOUR,
Attorney for Defendant. [12]

In the District Court of the United States for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Affidavit on Motion for Security for Costs.

State of Arizona,
County of Yavapai,—ss.

Erle H. Thompson, being duly sworn, deposes and says:

That he is the Claim Agent for the defendant in the above-entitled cause, and for and on its behalf, makes this affidavit, being duly authorized and knowing of his own knowledge the facts herein stated.

That to the best of affiant's knowledge and belief,

and so far as he has been able to ascertain, the plaintiff, Mike Koso, is not the owner of any property out of which costs could be made by execution sale.

(Signed) ERLE H. THOMPSON.

Subscribed and sworn to before me this 2d day of January, 1919.

[Seal] DAISY D. JONES,
Notary Public.

My commission expires January 7, 1922. [13]

In the District Court of the United States for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Notice of Motion for Security for Costs.

To Cox, Moore and Cox, Esqrs., Attorneys of Record for the Above-named Defendant, and to Mike Koso:

The plaintiff in the above-entitled cause, and his attorneys, will please take notice that upon the affidavit and papers in said action I shall move the Court at the courtroom thereof at Tucson, Arizona, on the 25th day of January, 1919, at the opening of court on that day, or as soon thereafter as counsel

can be heard, to require said plaintiff to give security for costs in this action.

(Sgn.) A. H. FAVOUR,
Attorney for Defendant.

Prescott, Arizona, Jan. 15, 1919.

[Endorsements]: No. 45 (Prescott). In the District Court of the United States for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Motion for Security for Costs, Affidavit and Notice of Motion. Filed January 18, 1919. Mose Drachman, Clerk. By Effie D. Botts, Deputy Clerk. [14]

In the District Court of the United States for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Objections to Sufficiency of Motion for Security for Costs.

Comes now plaintiff by his attorneys and objects to the sufficiency of the showing made by defendant to require plaintiff to give security for costs on the ground that said application does not comply with

the laws of the State of Arizona concerning such application for security for costs, and does not show that plaintiff is not the owner of property out of which costs could be made by execution sale.

COX & MOORE,

Attorneys for Plaintiff.

[Endorsements]: No. 45 (Prescott). In the District Court of the United States, for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Objections to Sufficiency for Security for Costs. Filed January 24th, 1919. Mose Drachman, Clerk. By Nat. T. McKee, Deputy. [15]

At a regular term, to wit, the October, 1918, term of the United States District Court for the District of Arizona, held in the courtroom of said court, in the City of Phoenix, State and District of Arizona, on Thursday, the 6th day of February, A. D. 1919. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—February 6, 1919.)

L.–45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court — February 6, 1919 — Order Submitting Motion for Security for Costs.

The motion for security for costs heretofore filed by the defendant in this case is this day submitted and by the Court taken under advisement. [16]

At an adjourned term, to wit, the March, 1919, adjourned term of the United States District Court for the District of Arizona, held in the courtroom of said court, in the City of Prescott, State and District of Arizona, on Monday, the 4th day of August, A. D. 1919. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—August 4th, 1920.)

L.–45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—August 4, 1920—Order Overruling Motion for Security for Costs.

The motion of the defendant to require plaintiff to furnish security for costs in this case having been heretofore submitted, and having been duly considered,

IT IS ORDERED by the Court that said motion be, and the same hereby is, overruled.

IT IS FURTHER ORDERED that Messrs. Favour and Cornick be entered as attorneys of record for defendant. [17]

At a regular term, to wit, the March, 1920, term of the United States District Court for the District of Arizona, held in the courtroom of said court, in the City of Prescott, State and District of Arizona, on Monday, March 22, 1920. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—March 22, 1920.)

L.–45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—March 22, 1920—Order of Substitution of Attorneys, etc.

IT IS ORDERED by the Court that R. B. Westervelt, Esq., and F. C. Struckmeyer, Esq., be substituted in the place of and for A. Y. Moore, Esq., and J. J. Cox, Esq., as attorneys for plaintiff.

IT IS ORDERED by the Court that the plaintiff herein elects to proceed in this case under the first cause of action of the complainant herein and that

the second cause of action may be and the same is hereby dismissed; and it is further ordered by the Court, that defendant's demurrer to said first cause of action be and the same is hereby overruled, to which ruling on the part of the Court the defendant then and there in open court duly excepted; and it is further ordered by the Court that the defendant be permitted to file an amended answer this day, to conform with the pleadings as they now stand. [18]

At a regular term, to wit, the March, 1920, term of the United States District Court for the District of Arizona, held in the courtroom of said court, in the City of Prescott, State and District of Arizona, on Thursday, the 25th day of March, A. D. 1920. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—March 25, 1920.)

L.–45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—March 25, 1920—Trial.

This case coming on regularly for trial this day, come now Messrs. Struckmeyer, Barnum and Wes-

tervelt for and on behalf of the plaintiff, and also the plaintiff in person, and come also Messrs. Favour & Cornick, attorneys for defendant. Both sides announce ready for trial. Thereupon sixteen jurors were called into the jury-box by the clerk and duly sworn to answer as to their qualifications, and were then examined by respective counsel; thereupon counsel or the defendant challenged for cause juror F. L. France, which challenge was resisted by counsel for the plaintiff, and denied by the Court, to which ruling of the Court the defendant then and there in open court duly excepted; thereupon respective counsel exercised their peremptory challenges and the following twelve jurors were selected to try this case, and duly sworn for that purpose, viz.: J. E. Richards, Walter J. Codington, William Howard Snody, C. E. Bisbee, J. Burgess, Fred T. Moore. C. R. Standridge, E. E. Ruth, K. V. West, A. J. Laswell, G. C. Overson, W. S. Bennett.

E. W. Powers was then duly sworn as court reporter in this case. The complaint filed herein was then read to the jury by F. C. Struckmeyer, Esq., attorney for the plaintiff; thereupon H. [19] H. Cornick, Esq., attorney for the defendant, read defendant's answer herein, to the jury. Thereupon, the plaintiff Mike Koso, for the purpose of maintaining on his part, the issues joined in this case, took the witness-stand in his own behalf and was duly sworn, examined and cross-examined; and for the purpose of further maintaining on the part of the plaintiff the issues joined herein, Win Wylie was called as a witness for the plaintiff, duly

sworn and examined, but not cross-examined; thereupon the plaintiff rested his case.

The defendant then, for the purpose of maintaining on its part the issues joined in this case, called the following witnesses, each of whom, in turn, was duly sworn, and examined and cross-examined, viz.: Samon Giles, Earl Thompson, L. P. Call, H. T. Southworth.

Thereupon the defendant rested its case.

The plaintiff then called in rebuttal the witness Win Wylie for further examination.

The defendant thereupon moved the Court for a verdict in favor of the defendant, which motion was denied by the Court.

There being no further evidence offered and the case being closed and completed, the same was argued by respective counsel to the jury, after which the jury was instructed by the Court; the jury then retired, in charge of their bailiff, Wm. F. Hattan first duly sworn for that purpose, to consider their verdict; and, after a time the jury returned into open court, in charge of their bailiff, and, upon being asked by the Court if they have agreed upon a verdict, through their foreman, state that they have agreed. Whereupon said jury, through their foreman, present their verdict, as follows:

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY,

Defendant.

Verdict.

We, the jury, duly empaneled and sworn in the above-entitled [20] action, upon our oaths, do find for the plaintiff and assess his damages at $7,500.00 (Seven Thousand Five Hundred Dollars).

WILLIAM HOWARD SNODDY,
Foreman.

And, the clerk, inquiring of said jury is such was their verdict, they stated that it was, and so said they all; whereupon the Court ordered the verdict recorded, and the jury discharged from the case.

AND IT IS ORDERED, ADJUDGED AND DECREED by the Court that judgment be entered in favor of said plaintiff and against said defendant in the sum of Seven Thousand Five Hundred ($7,500.00) Dollars, together with plaintiff's costs herein expended, in accordance with the verdict of the jury.

MIKE KOSO,
Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,
Defendant.

Judgment.

This cause coming on regularly for trial on this day, Messrs. Struckmeyer, Barnum and Westervelt, appearing for the plaintiff herein, and Messrs. Favour and Cornick appearing for the defendant

herein, upon the complaint of the plaintiff, and the answer of the defendant herein, this case was tried by the Court and a lawful jury of twelve men, and evidence was offered and submitted by the defendant herein, as well as by the plaintiff herein; and the case, being argued by respective counsel, was submitted to the jury under the instructions of the Court; the jury retired to consider of their verdict and, on this 25th day of March, 1920, returned into court the following verdict:

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY,

Defendant.

VERDICT.

We, the jury, duly empaneled and sworn in the above-entitled action, upon our oaths, do find for the plaintiff and assess his damages at $7,500.00 (Seven Thousand Five Hundred Dollars.)

WILLIAM HOWARD SNODDY,
Foreman. [21]

WHEREFORE, IT IS ORDERED, ADJUDGED AND DECREED, that the plaintiff, Mike Koso, do have and recover from the defendant, United Verde Extension Mining Company, a corporation, the sum of Seven Thousand Five Hundred ($7,500.00), and the plaintiff's costs herein taxed in the sum of $45.70. [22]

In the District Court of the United States, for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Notice of Motion for New Trial.

To Mike Koso and to F. L. Struckmeyer and R. B. Westervelt, His Attorneys of Record:

You and each of you will please take notice that the defendant has filed its motion for a new trial in the above cause and that on April 5, 1920, hearing on said motion will be heard before above-entitled court at the courtroom thereof at Prescott, Arizona, if the court be then in session, or on the first law and motion day thereafter at which Prescott causes shall come on regularly for hearing or as soon thereafter as counsel can be heard. A copy of said motion is attached hereto.

(Sgn.) FAVOUR & CORNICK,
Attorneys for Defendant.

Prescott, Arizona, March 29, 1920.

[Endorsements]: Notice of Motion for New Trial. Recd. copy of within this 30 day of March, 1920. Struckmeyer & Westervelt. Filed Mar. 30, 1920. C. R. McFall, Clerk. [23]

In the District Court of the United States, for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Motion for a New Trial.

Comes now the defendant in the above-entitled cause and respectfully moves the Court for a new trial for the following causes materially affecting substantial rights of said defendant. This application is based upon the pleadings and all papers filed in the above cause and upon minutes of the court and the transcript of testimony and instructions.

I.

Irregularity in the proceedings of the court and order of the Court whereby the challenge of the defendant to Juror F. L. France on the ground of his bias and prejudice against defendant was denied.

II.

Excessive damages which appear to have been given under the influence of passion or prejudice or both, in that (a) there was no proof or even evidence offered by plaintiff that he was not negligent, and (b) there was no evidence at all that the plain-

tiff suffered permanent injury, while the verdict was excessive even if permanent injury had been proved.

III.

Insufficiency of evidence to justify the verdict in that, (a) no evidence was offered or introduced to prove the [24] plaintiff was not negligent, which fact plaintiff was required to allege and prove under the Employers' Liability Law of Arizona as well as under the instructions given in this cause by the court; (b) no evidence was offered or introduced to prove the alleged injury was permanent and the verdict based upon a conclusion by the jury that the injury was permanent indicates an inference was drawn not based upon facts.

IV.

The verdict is against the law.

V.

Errors of law to the prejudice of the rights of the defendant occurred at the trial, to wit:

(a). The Court erred in denying the challenge of the defendant to the Juror F. L. France.

(b). The Court erred in admitting in evidence over objection of defendant the American Mortality Tables.

(c). The Court erred in making reference to the mortality tables in its instructions to the jury.

(d). The Court erred in instructing the jury that the mortality tables might be considered by the jury and in permitting the jury to consider the said tables or any facts or figures taken therefrom.

(e). The Court erred in denying defendant's

motion for an instructed verdict in favor of the defendant at the close of the evidence, for the aforesaid grounds, and especially for the reason that there was no proof or evidence showing the plaintiff was *not* negligent, the plaintiff had introduced no evidence that he was *not* negligent, proof of such fact being required by the Employers' Liability Law to be alleged and proved by the plaintiff, and evidence introduced by defendant showing that plaintiff was specifically warned by defendant to pick down any loose material before going to work was not refuted, but plaintiff did not introduce [25] evidence showing he obeyed the warning or exercised care that an ordinarily prudent miner of experience should exercise, or any care whatever.

(Sgn.) FAVOUR & CORNICK,
Attorneys for Defendant.

Prescott, Arizona.

[Endorsements]: In the District Court of the United States for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Motion for a New Trial. Recd. copy of within this 30 day March, 1920. Struckmeyer & Westervelt. Filed March 30, 1920. C. R. McFall, Clerk. [26]

At a regular term, to wit, the April, 1920, term of the United States District Court for the District of Arizona, held in the courtroom of said court, in the City of Phoenix, State and District of Arizona, on Tuesday, April 20, A. D. 1920. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—April 20, 1920.)

L.–45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—April 20, 1920—Order Submitting Motion for New Trial.

The motion for a new trial heretofore filed in this case by defendant is this day submitted and by the Court taken under advisement. [27]

At a regular term, to wit, the May, 1920, term of the United States District Court for the District of Arizona, held in the courtroom of the City of Tucson, State and District of Arizona, on Monday, the 21st day of June, A. D. 1920. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—June 21st, 1920.)

L.–45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—June 21, 1920—Order Overruling Motion for New Trial.

IT IS ORDERED that defendant's motion for a new trial in this cause be and the same is hereby overruled, to which ruling of the Court the defendant duly excepts. [28]

In the District Court of the United States, in and for the District of Arizona.

L.–45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Order Extending Time to File Bill of Exceptions.

The motion of the above defendant for a new

trial in the above cause having been overruled on June 21, 1920, and notice thereof having been mailed to the defendant on June 28, 1920, and said defendant having made application on June 29, 1920, for a reasonable time within which to perfect its appeal, and it appearing that no unreasonable delay will be caused thereby—

IT IS ORDERED that the above-named defendant be, and it is hereby granted to and until August 1, 1920, within which to prepare, tender and file its bill of exceptions herein and otherwise perfect its appeal to the Circuit Court of Appeals.

WITNESS my hand at Tucson, this 1st day of July, 1920.

(Signed) WM. H. SAWTELLE,
Judge of the District Court for the District of Arizona.

[Endorsements]: Order Extending Time to File Bill of Exceptions. Filed July 1, 1920. C. R. McFall, Clerk. [29]

At a regular term, to wit, the May, 1920, term of the United States District Court for the District of Arizona, held in the courtroom in the City of Tucson, State and District of Arizona, on Tuesday, July 6th, 1920. Honorable WILLIAM H. SAWTELLE, District Judge, Presiding.

(Minute Entry—July 6th, 1920.)

L.–45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Minutes of Court—July 6, 1920—Order Fixing Amount of Supersedeas Bond.

Upon application of the defendant, United Verde Extension Mining Company, a corporation:

IT IS ORDERED that supersedeas bond of said defendant to be furnished by said defendant in connection with writ of error in this cause be and the same is hereby fixed at the sum of Eight Thousand Five Hundred Dollars. [30]

In the District Court of the United States, in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Stipulation in Re Bill of Exceptions, etc.

It is stipulated by and between the attorneys for the above-entitled plaintiff in error and defendant in error that all orders relating or pertaining to the settlement and signing of the bill of exceptions or records or papers or proceedings in connection with the appeal now pending so far as applying to the Judge of the District Court in and for the District of Arizona wherein the said case was tried may be made by Judge Sawtelle in San Francisco, California, with the same force and effect as if made in Arizona.

(Sgn.) F. C. STRUCKMEYER,
Attorney for Plaintiff.

(Sgn.) FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsement]: Filed Aug. 2, 1920. C. R. McFall, Clerk. By W. W. Downing, Deputy Clerk. [31]

In the District Court of the United States, in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Notice of Filing Bill of Exceptions.

To Mike Koso, Plaintiff, and F. C. Struckmeyer and R. B. Westervelt, His Attorneys of Record:

You will please take notice that the defendant in the above-entitled cause desiring and intending to procure a writ of error from the above court in the above-entitled cause on the 25th of March, 1920, has prepared and this day mailed for filing in the office of the clerk of said court for presentation to Hon. W. H. Sawtelle, the Judge who tried the said cause, its bill of exceptions, copy of which is this day served upon you.

Dated this 3d day of July, 1920.

(Sgn.) FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsements]: Notice of Filing Bill of Exceptions. Copy received this 3d day of July, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed July 6, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [32]

In the District Court of the United States, for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Bill of Exceptions.

Be it remembered that afterward, to wit, on the 25th day March, 1920, at a term of the above court, held at Prescott in and for the District of Arizona, before his Honor, William H. Sawtelle, District Judge, the issues joined came on to be tried by a jury, the said Judge presiding; the plaintiff being represented by F. C. Struckmeyer, W. L. Barnum and R. B. Westervelt, and the defendant by Favour & Cornick; and upon trial the attorneys for the plaintiff called as a witness the plaintiff, MIKE KOSO, who being duly sworn, testified as follows:

Testimony of Mike Koso, for Plaintiff.

I am a native and citizen of Finland and am forty-two years old. I have been a sailor, and in mining the last eighteen years. I went to work for the defendant on the night of December 14th. I was hurt about six-thirty o'clock the next morning. At that time I was shovelling into a mine car on the 1200-foot level in which I had been told to work by the foreman. I was bending to get a shovelfull and rock fell from the roof. I was about [33] fifteen feet from the face of the dirt. I don't know whether there was more than one rock. The rock knocked me down and I lay down for perhaps fifteen minutes or a half hour. I could not get my wind. Then I started on my knees, then put my hands against the wall and got on my feet and walked into a station and lay down. Finally, I don't know how long I was sitting there, two car-

(Testimony of Mike Koso.)

men, Nick Thomas and another, came in with my hat. They telephoned the cage and tried to get me on it. Finally the cage came down and the shift boss came up from the 1300-foot level and they raised me up and put me on the cage and took me to the dry-house. They pulled off my clothes and put on clean ones and tried to wash my neck and back which were full of rocks and then the automobile came and took me to the hospital.

No one was working with me at the time I was hurt. I stayed in the hospital about twenty days—I think it is the company hospital—and then the doctor told me to get out. I stayed awhile at Jerome and then came back to Phoenix.

My back and my right shoulder were hurt and also some of my left foot over the little toe was sore awhile but is all right now. The rocks hit the whole length of my back (indicating).

Mr. STRUCKMEYER.—"And may the records show that the one place that the witness pointed, to the lower part of the vertebra."

The COURT.—"I didn't see his hand; I don't know whether he did or not."

Before this accident I was feeling good and had nothing on my back and shoulders; "I am, she is sore now." I can move by limb around to-day and am able to do easy work but not hard work; after I work ten or fifteen days my back starts to hurt bad. I can stoop over a little but it hurts. I was receiving $5.50 a day; I have always done hard work and cannot do writing or clerical work. (2) [34]

(Testimony of Mike Koso.)

Cross-examination of MIKE KOSO.

I took out first papers last summer. I was hurt on the first shift I worked for the company. I was standing fifteen feet from the face of the tunnel when the rock fell; I can't tell how high up it was but I could not have reached it with a pick. I was working in waste and don't know what kind of a tunnel it was or how wide or high it was. At the place where this rock fell it was not timbered and I saw no timbering in the tunnel though there may have been some back fifty feet; but it was soft ground where I was fifteen feet from the face and there was no timbering there. I don't know how big the rock was but it was soft rock else it would have killed me. When I started to get up the rock fell from both sides of me but I don't know how much there was. It hit me hard; I could not get my wind but did not lose consciousness. I laid there abont fifteen mintes or half an hour and then got up and walked against the wall into the station and lay down there about an hour, I think. When the two carmen came they telephoned the cage and when this came they put me on it. One of the men went up with me and took me into the dry-house. I walked but the shift boss was holding me. They put me on a bench in the house and then the dryman took off my clothes; I could not lift my hand above my head. I had on undershirt, trousers and shoes. He put other clothes on me after he washed me. I could not lift my hands to put on my shirt. In the hospital I did not get up

(Testimony of Mike Koso.)

at first except with help. After ten days I put my clothes on every day; they helped me put my coat on, I could not turn my arm. Toward the last I put my clothes on and had an awful time. The doctor told me to get out and after a week or two weeks I went to Phoenix and have stayed there practically all the time since. In Phoenix I went to see a Doctor Nichols, at first every day, and he told (3) [35] me to lay down all I could. He wanted to put me in the hospital but I had no money. The other fellows that I lived with did the cooking. My foot got well and my shoulder-blade and back changed a little better. I did a little easy work in a cigar-store or pool-hall.

Redirect Examination of MIKE KOSO.

I do not know where Dr. Nichols is now; he has left Phoenix.

Recross-examination of MIKE KOSO.

I do not remember if my testimony was taken in Phoenix in or about August, 1918, it was a long time ago. Mr. Cox was my lawyer then. He refused to allow an examination by a doctor when requested at the hearing. I left it to Mr. Cox.

Testimony of Dr. Winn Wylie, for Plaintiff.

I have been a physician and surgeon between forty and fifty years and in Arizona between twenty-four and twenty-five years. I know Mike Koso and made an examination of him March 22d to 24th, 1920. I presume my examination was

(Testimony of Dr. Winn Wylie.)

made to determine his condition for the purpose of testifying in this case.

Mr. STRUCKMEYER.—"That is provided there was anything to testify about."

Mr. CORNICK.—"We object to that."

Mr. STRUCKMEYER.—"Pardon me, I withdraw that."

I went over him carefully, taking his history, examining his body by sight, hearing and touch, then had X-ray photographs taken, and examined him with a fluroscope. The fluroscope enables one to see with the eye what the photograph plate shows in a photograph. The X-rays were taken under my direction.

Mr. STRUCKMEYER.—"We offer those X-rays, if your Honor pleases, photographs, as an aid, and illustrative of the testimony of the witness to be given." (4) [36]

Mr. CORNICK.—"He took these and developed them himself."

Mr. STRUCKMEYER.—"No, they were not developed by him."

Mr. CORNICK.—"We object then."

(The Court sustained the objection.)

The fluroscope shows to the eye the same that the photograph plate copies. I cannot give the whole of his condition but the part I observed.

"A. In the first place he has an hernia, a beginning hernia; a starting hernia on the right side. Hernia is another name for rupture. He has lost about fifty per cent of the power of his right hand.

(Testimony of Dr. Winn Wylie.)

There has been an injury to the scapula or shoulder-blade. And there has been an injury to the fifth lumbar vertebra on the right side that has been repaired by nature, and a bony ridge thrown out connecting the fifth lumbar vertebra with the first sacral vertebra. The injury to the scapula, the bone injury has united and there is more bony tissue there at present time than there was before he was injured.

"Q. What did that injury consist of?

A. Fractures.

"Q. Now, the fifth lumbar vertebra, Doctor, whereabouts is that located in the body?

"A. It is at that portion of the back where the gentleman (plaintiff) put his hand when it rested at the lower portion of the area that his hand covered."

Whereupon plaintiff's counsel offered the American Mortality Tables.

Mr. CORNICK.—"May it please your Honor, there are different classes of individuals and the tables introduced without proof does not apply to all those and we submit they do not apply to miners and in this case we submit that they have no application without proof and so we object to them without proof. Our objection, your Honor, is this, that the Mortality Tables are based on the law of averages and they do not apply to specific instances of hazardous occupations, that a miner, a man engaged in the occupation of mining, would not fall within the law of averages and without explanation

that his mortality would be more great and his expectancy for, or shorter than the average (5), [37] and we would be entitled to have that shown in the construction of the Mortality Tables and without explanation, without their being proven, the Mortality Tables would not apply to this hazardous occupation."

The COURT.—"Well, I will overrule the objection and give you an exception; there may be something in that objection but I prefer without any authority on the subject, I think I shall admit them."

Whereupon the Court gave counsel for defendant an opportunity to obtain authority and recessed for the noon period. At convening of the court after the recess, counsel for defendant submitted authority, 34 S. W., page 331. The Court examined the authority and gave opportunity to counsel for plaintiff to examine it.

Mr. STRUCKMEYER.—"On previous occasions I have had occasion to examine the authority and that text is supported by those authorities. If your Honor pleases, I think that the evidence shows that he was not afflicted with any ailment at the time of the injury."

The COURT.—"Yes, but there is one particular in which you haven't brought yourself within that rule, that is that you have not shown anything as to the plaintiff's previous habits. You did prove what his previous occupation was and what his age was at the time of the injury and so*n* on, but you

(Testimony of Sampson Jiles.)

didn't offer any proof as to his previous habits."

Mr. STRUCKMEYER.—"Will not the presumptions aid there?"

The COURT.—"Very well, I have ruled with you, so if you are willing to take the chance, very well. You may have an exception. I shall charge the jury that the fact that the plaintiff was engaged in a more hazardous employment than the persons of whom the tables were taken of is a circumstance to be taken into consideration by the jury." (6) [38]

The plaintiff thereupon rested his case and the defendant called SAMPSON JILES, who being duly sworn testified as follows:

Testimony of Sampson Jiles, for Defendant.

I was born in England; I am a naturalized American citizen and live in Jerome; I have served in the United States army; I am now in the milk business and do not work for the defendant. Previously I was a miner for ten years and was jigger boss for the defendant at the time of the accident to Mike Koso. I had charge of five levels and thirty-two men, and worked from eleven-thirty P. M. to seven-thirty A. M. Koso was employed by the company and I went with him to his place of work on the 1200-foot level, which was a ventilation drift seven feet wide and five feet four inches across the top. Koso was working at the face of the drift with Nick Thomas and a man named Ropez. The drift was timbered to within less than

(Testimony of Sampson Jiles.)

three feet of the face and there was no room for another set. The roof was seven feet ten inches high, just within reach of a pick. The timbers came up to within two inches of the roof and the lagging was placed on top of them. There were no open spaces in the lagging and timbers. I went in with the foreman and put Koso to work and instructed him to pick down loose rock even if it took him the whole shift, and then to go ahead and muck. He said he was a miner, and his partner had been working over a month. It was five or six hundred feet from the face where he was working back to the station. I was making my rounds and was going with the cage to the 1200-foot level and I saw Koso coming out; I asked him what was wrong and he said he got hurt, and so we took him in the cage to the top and he walked to the dry-house. No one was with him when he came to the cage. The change man, who died last summer, and I were with him in the dry-house. No assistance at all was given Koso; he walked into the cage by himself and walked from the collar of the shaft to the dry-house about three hundred feet, went to his locker, undressed himself without any complaint, After he pulled his undershirt off I examined him and found scratches on his right shoulder and red marks lower down, but the skin was not broken. Afterwards he then went in (7) [39] and took a hot bath without assistance and without complaining. He came out and dried himself and dressed and walked out to the automobile I had ordered

(Testimony of Sampson Jiles.)

and went to the hospital. He did not complain and did not have the appearance of a man badly injured. After he got in the automobile I went down and examined the place where he got hurt and found about a bushel of fine dirt; there were no lumps as big as my fist. It was what we call waste, soft material. The roof was in good condition, just a little hole where the stuff had fallen from. I was never on the witness-stand before.

Cross-examination of SAMPSON JILES.

The small hole in the roof was made by the bushel of rock. The roof was perfectly even. The hole was not there when I put Koso to work. Koso did not wait at the station and there was no one else there but the cager and myself. Koso did not complain of pain or say he was unable to walk. He appeared as able to walk as if not hurt at all and walked to the dry-house and to the automobile without any complaint. He showed no signs of injury except the scratches, which I did not see until he took his shirt off. I called the automobile to take him to the hospital, although he presented no appearance of injury; I called it before I saw his back; I had authority to call as there was then no ambulances. I do not know where Nick Thomas is now; he worked for the company for some time afterwards.

Redirect Examination of SAMPSON JILES.

The scratches were pretty near down to the waist line. I called the automobile because it was office orders.

(Testimony of Sampson Jiles.)

Recross-examination of SAMPSON JILES.

I would call an automobile if he had a scratch on his hand.

Testimony of Erle Thompson, for Defendant.

I live in Jerome and am employment and claim agent of the defendant company and among other things assist counsel in regard (8) [40] to witnesses in the defense of causes. I knew Nick Thomas; he is in California but I do not know where.

Cross-examination of ERLE THOMPSON.

I know he said he was going to California. I did not have occasion to inquire whether he left a forwarding address; I think he was a single man; I don't know of any relatives in Jerome; I did not know whether he had friends and had no occasion to make inquiry. He was a miner.

Redirect Examination of ERLE THOMPSON.

Thomas left the employ of the defendant some time early in 1918, I think.

Testimony of Dr. L. P. Kaull, for Defendant.

I have been a physician and surgeon for twenty-two years; I graduated from the University of Kansas in 1898 and have been in active practice most of the time since with the United Verde Copper Company hospital at Jerome, and have had the direction of the surgery of the hospital and am acquainted with the effect of fractures of bones. I

(Testimony of Dr. L. P. Kaull.)

States army. It might be possible for a man who had broken his scapula to undress himself within one or two hours after the break, but the pain would be very great in taking off his shirt. In the very great majority of cases complete disability and paralysis would result from the fracture of the fifth lumbar vertebra, at least temporarily, and a man would absolutely not be able to walk within an hour or two after such a fracture.

Cross-examination of Dr. L. P. KAULL.

I did not go overseas but was stationed in this country. I am employed at the hospital of the United Verde Copper Company, which does the hospital work of the defendant company under contract. I have never been able to see an injury of this kind with a fluroscope though I use one daily. I know Dr. Wylie; he stands (9) [41] very high in his profession, and if he asserts the fluroscope does reveal such an injury, I would not question his statement.

Redirect Examination of Dr. L. P. KAULL.

If Dr. Wylie said he observed anything through the fluroscope I would not doubt his word, but this does not change what I have said about the effect of such an injury.

Testimony of Dr. H. T. Southworth, for Defendant.

I have been a physician and surgeon since graduation in 1901 and have had to do with fractures of bones. I was Major in the Medical Corps of the

(Testimony of Dr. H. T. Southworth.)

United States Army and for a time commanded the U. S. A. 8th Hospital at Nogales and did all the surgery there. It would be very painful for a man who had within two hours fractured his scapula to undress himself. The effect, within one or two hours of the fracture of the fifth lumbar vertebra of the right side would almost always be paralysis, at least partial, and movements would be very labored if possible at all.

Cross-examination of Dr. H. T. SOUTHWORTH.

I cannot imagine a slight fracture of the vertebra as unimportant. A bony ridge would probably not be thrown around the bone and connect with the other vertebra unless the body of the vertebra was injured. There might be a contusion of the vertebra without paralysis following. I cannot conceive of an impacted fracture of the vertebra not causing at least some degree of paralysis that would be visible to the layman. Paralysis would not necessarily follow the chipping off of a portion of the outside of the bone.

Defendant thereupon rested his case.

REBUTTAL TESTIMONY OF PLAINTIFF.

Testimony of Dr. Wylie, for Plaintiff (In Rebuttal).

The injury to the fifth lumbar vertebra I have testified to was not of a character to necessarily produce paralysis. (10) [42]

(Objected to by counsel for defendant, as examination in chief; objection sustained.)

Thereupon the counsel for defendant moved the

Court to direct a verdict in favor of the defendant, which motion was denied, and exception to said denial was noted.

Thereupon both sides having rested, the Court instructed the jury as follows:

Court's Charge to the Jury.

The COURT.—Gentlemen of the jury, this is an action brought by the plaintiff against the defendant to recover of the defendant the sum of twenty-five thousand dollars as damages for alleged personal injury, alleged to have been sustained by him while in the service and employment of the defendant.

The plaintiff alleges in his complaint that on or about six-thirty o'clock on December 15th, 1917, plaintiff was employed by the defendant and was engaged in the performance of work and labor for the defendant in shoveling certain loose rock and earth near the face of said twelve hundred foot drift or level into said mine for the purpose of being transported to the main shaft, and in performing said work plaintiff was using appliances furnished by defendant for the performance of said work; that said work and labor being so performed by plaintiff for defendant was work and labor in or about a hazardous occupation, the hazardous occupation of mining, and within the scope of plaintiff's employment and while so engaged in the regular course of said work, plaintiff was injured by an accident arising out of and in the course of his labor, service and employment and due to a

condition or conditions of such employment and without negligence on his part in (11) [43] the following manner, to wit: At about the above-mentioned time plaintiff was working in said twelve hundred foot drift or level at a point near the face of said drift and was engaged in shovelling loose rock and earth into said mine car as aforesaid, when certain large rock and boulders fell from the roof of said drift and struck the plaintiff on his shoulder and back and his left foot, knocking plaintiff down on the floor of said drift and cut, bruised, broke and mangled plaintiff's shoulder, back and foot and thereupon seriously, painfully and permanently injured the plaintiff.

Now, the defendant, in its answer, admits that plaintiff was in its employ on the date mentioned but it denies each and every other of the material allegations in the plaintiff's complaint. This casts upon the plaintiff the burden of proving by a preponderance of the evidence every material allegation of his complaint.

This action is brought under the Arizona Employer's Liability Law. Under the provisions of that act, an employer in certain hazardous occupations, among them mining, is liable for the personal injury or any employee, any workman injured by an accident arising out of and in the course of such labor, service and employment, and due to a condition or conditious of such occupation or employment in all cases in which such injury of such employee shall not have been caused by his own negligence.

Before a verdict in any amount can be returned in favor of the plaintiff and against the defendant, it must be established by the greater weight of the evidence, first, that the accident complained of by the plaintiff was due to a condition or conditions of his occupation, and second, that it was not caused by his own negligence. (12) [44]

It was the duty of plaintiff, while in the employ of the defendant and at the time and place of the accident in question, to exercise reasonable care and prudence for his own safety. An employee may not place the whole burden of responsibility upon his employer for his safety, he must exercise such care as a reasonably prudent careful man under the same circumstances and conditions would exercise for his own safety, and if he fails to do so and is injured solely as a result of his own negligence, then the employer is not liable.

The first question you will determine is whether the plaintiff, at the time and place mentioned in the complaint and while in the service or employment of the defendant and in the course of his labor, received an injury or any injuries set forth in his complaint which I have just read to you, in order to determine that question you will consider all of the testimony and all of the facts and circumstances in evidence. You are not compelled to find that the plaintiff was injured merely because he claimed to have been injured but you are to consider his testimony as you would that of any other witness, taking into consideration the fact that he is interested in the result of the case and that he

would be the beneficiary of any verdict which you might render in his favor. However, you are not to disregard his testimony merely because he is the plaintiff and is interested in the result of the case, you consider his testimony as you would that of any other witness in the case.

It is your province to determine the credibility of the witnesses examined in the case, whether for the plaintiff or the defendant, and in weighing the testimony of the (13) [45] several witnesses you have the right to take into consideration their manner and appearance while giving their testimony, their means of knowledge, any interest or motive which they or either of them may have, if shown, and the probability or improbability of the truth of their several statements when considered in connection with all the other evidence in the case.

If you believe that any witness, whether for the plaintiff or the defendant, has wilfully sworn falsely to any material fact you have the right to disregard the testimony of such witness except in so far as his statement may be corroborated by other credible evidence in the case, or by the facts and circumstances in evidence.

It is your duty, in arriving at a verdict in this case, to be governed by the evidence in the case and the law, as herein given you by the Court, regardless of the fact that the plaintiff is an individual and the defendant is a corporation, and regardless of the condition of the parties to this suit financially and of the effect of your verdict upon the parties, or either of them.

Now, gentlemen, if you find from the testimony that the plaintiff at the time and place mentioned in the complaint sustained any of the injuries set forth in the complaint, and that such injury or injuries were not caused by or were not the result of the plaintiff's own negligence, you will next consider and determine the nature and extent of such injury so sustained, and in this connection, the burden of proof is upon the plaintiff to show by a preponderance of the evidence that the injuries, defects and afflictions of which he complains, or some of them, are the proximate result of the accident. (14) [46]

As before stated, you are made the judges as to the extent and degree of the injuries, if any, so sustained and that is, as to whether or not they were in fact received and whether or not they are permanent in character and as to what extent, if any, by reason of such injury plaintiff has suffered physical pain, also as to what extent, if at all, he has been by reason of such injury disabled and incapacitated from following his usual vocation as described in the complaint, or any vocation for which he is qualified and to what extent, if at all, as a result of said injury his spinal column has been impaired or his shoulder-blade or shoulder has been injured, or whether or not, and whether or not these incapacitations, if any, are permanent or merely temporary. All these points go to make up the nature and extent of the plaintiff's alleged injury and should you award the plaintiff damages in any amount it is your duty to consider each and

every one of these points as a factor in computing the amount, in computing the award.

If you find that the plaintiff is entitled to recover in this action the amount of recovery, if any, is for you to determine from all of the facts in the case. Of course, you could not measure in dollars and cents the exact amount to which he is entitled, if any, but it is for you to say in the exercise of sound discretion, from all of the evidence in the case, after considering and weighing all of the evidence produced before you without fear and without favor and without passion and without prejudice what amount of money will reasonably compensate him for the damage, if any, he has sustained.

If you find for the plaintiff in this case under the instructions given you by the Court and that the plaintiff (15) [47] has sustained the damages as set forth in his petition in any amount, then to enable you to estimate the amount of damages it is not necessary that any witness should have expressed an opinion as to the exact amount of such damage, put you, the jury, may yourselves make such estimate from the facts and circumstances in proof, and by considering them in connection with your knowledge, observation and experience in the ordinary every day affairs of life.

Now, the term "due to a condition or conditions of the employment or occupation" as used in these instructions means more than that the accident in question and the injury to plaintiff, plaintiff was injured, arose out of and in the course of the work he was doing or was employed to do, they mean the

inherent risks and dangers of his occupation or employment which were not avoidable by him.

By the expression "preponderance of the evidence" as used in these instructions is meant the greater weight of the evidence, it does not necessarily mean that the greater number of witnesses shall be produced on one side or the other, it means the more convincing force or the greater probability of the truth of the evidence on one side when compared with or weighed against the evidence in opposition.

In the ascertainment of damages the law does not lay down any definite mathematical rule, it says that you, the jury must be governed by sound sense and good judgment and make such award of damages, if any, as would be just compensation. The testimony in this case shows that the plaintiff is now forty-two years of age and testimony has been received for the purpose of showing, or tending to show, that the probable duration of life of a person forty-two years of age is 26.72 years. And these mortality tables (16) [48] were admitted in evidence in this case in order to enable you to determine the probable duration of the plaintiff's life. It is stated that in actions for personal injuries, if the injury is of a permanent character, in estimating the damages the expectancy of life of a person injured is an essential element and to show such expectancy standard mortality tables are admissible in evidence. The fact that the person injured or killed was engaged in a more hazardous employment than the persons with reference to whom the

tables were made up, that is, the average man, is a circumstance—the average man of good health—is a circumstance to be taken into consideration by the jury as tending to show that his expectancy of life, that is, a man engaged in hazardous occupations, was less than the tables would indicate to one of his age but the tables are none the less admissible on that account.

Now, this testimony as to the plaintiff's age and his expectancy is based upon these American Mortality Tables, which are framed upon the basis of the average duration of the lives of a great number of persons and it has been held that the rule to be derived from such tables may not be the absolute guide of the judgment and consciousness of the jury in a case of this character. They may be, however, considered by the jury in connection with all other evidence in the case.

As before stated, if you find for the plaintiff you should award a fair and reasonable compensation, taking into consideration what the plaintiff's income was, what it probably would have been, how long it would have lasted, whether he would have been regularly employed and able to (17) [49] perform labor, whether sickness might overtake him and he would thereby lose as a result thereof and all the contingencies to which he was liable, that is, his earning capacity, and then award such compensation as you think would be fair and just.

Now, some people have an idea that you should find that a jury should find an amount which, put at eight per cent interest would, practically eight

per cent interest, would earn the same amount of money that the plaintiff was earning at the time he was injured, now manifestly it would not be proper for you to use a sum which put at eight per cent interest would earn an amount equal to the wages of this plaintiff, because at the end of the 26.72 years which it is claimed is plaintiff's life expectancy, of the average man of forty-two years, the plaintiff would not only have had the income from the principal sum all those years but he would also have remaining the principal and that is not a fair criterion to be followed or acted upon.

If, under the facts in this case and the law as I have stated it to you you come to the conclusion that the plaintiff is entitled to recover some amount of compensation for the injuries he claims to have sustained, you must not render what is known as quotient verdict, that is, you must not add together the amounts and sums which each of you believe plaintiff is entitled to and divide by twelve or any other number. Such or any similar method of arriving at plaintiff's compensation would be unlawful and the Court might be compelled to set aside the verdict if it is reached in such a manner.

If you find for the plaintiff, the form of your verdict will be, "We, the jury, duly empaneled and sworn in the (18) [50] above-entitled case, upon our oaths do find for the plaintiff and assess his damages at so many dollars," inserting the amount which you determine should be awarded to him. Should you find for the defendant, the form of your verdict will be, "We, the jury, duly empaneled and

sworn in the above-entitled action, upon our oaths do find for the defendant.'' You will cause your foreman to sign the verdict which represents your conclusion. Your verdict must be unanimous. The rule which prevails in the State courts allowing nine jurors to return a verdict in civil cases does not prevail in the Federal Court. A jury, within the meaning of the Constitution of the United States, means a jury of twelve and therefore it requires the unanimous verdict of the entire jury before one can be returned.

Any exceptions on behalf of the plaintiff?

Mr. STRUCKMEYER.—None, I think.

The COURT.—Any on the part of the defendant?

Mr. CORNICK.—We desire to note an exception to one part of your Honor's charge, and to make two requests. We desire to note an exception to that part of your Honor's instructions with regard to the mortality tables as evidence in this case, because we believe that under your Honor's charge the instruction presumes the permanency of the injury. Exception allowed.

The COURT.—Well, if you or anyone else so understood me, I desire to correct it now, because I didn't assume, and I don't assume that the plaintiff has been permanently injured or injured at all, that is a question for the jury.

Mr. CORNICK.—Then we desire further, your Honor, to note an exception—(19) [51]

The COURT.—Pardon me, but I do say that if the jury does come to the conclusion that the in-

juries are permanent, then they may consider the Mortality Tables, if they come to the conclusion that the injuries are temporary and not permanent, then the Mortality Tables as to his expectancy of life should not be considered at all. Any further exceptions?

Mr. CORNICK.—May we have an exception to this explanatory charge?

The COURT.—Yes, you may.

Mr. CORNICK.—We have two requests, if your Honor please, and I have one other request which I didn't frame, if I might state it.

The COURT.—Well, the rule requires all requests to be presented before the argument begins so as to give me an opportunity to examine them before I charge the jury.

Mr. CORNICK.—I wasn't aware of that.

The COURT.—I might have given them if they had been offered sooner, but now I think I have substantially covered these and you may have an exception and also refusal to give them because they are offered too late.

The evidence hereinbefore set out in this bill of exceptions contains all the testimony given on the trial and constitutes all the evidence upon which the Court's instructions aforesaid were based and affecting the matters to which defendant's exceptions relate.

Thereafter the jury returned a verdict of Seventy-five Hundred ($7500.00) Dollars in favor of the plaintiff. (20) [52]

Thereupon defendant's counsel made a motion

for a new trial, which motion was argued by the respective counsel on April 20th, 1920, and by the Court taken under advisement, and which motion was denied by said Court on June 21st, 1920.

The Court then caused an order to be entered giving the defendant until August 1st, 1920, to prepare its bill of exceptions and have it duly signed and filed.

The defendant's counsel in accordance with the rules of the Court submitted a draft of said bill of exceptions to counsel for the plaintiff on July 3d, 1920, and now, within the time aforesaid so allowed, presents this, its bill of exceptions, and asks that same be examined, approved and allowed by the Court and filed, made and deemed to be a part of the record in this cause.

The defendant prays that this bill of exceptions may be allowed, settled and signed.

FAVOUR & CORNICK,
Attorneys for Defendant.

We agree to the foregoing proposed bill of exceptions and have no objections to make thereto.

_____,
Attorney for Plaintiff.

Approved and allowed, August 31, 1920.

WM. H. SAWTELLE,
Judge. (21)

[Indorsements]: In the District Court of the United States, for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Bill of Exceptions. Copy recd. this 3 day of July, A. D.

1920, Struckmeyer & Westervelt. Filed July 6, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [53]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Petition for Writ of Error.

And now comes the United Verde Extension Mining Company, defendant in the above-entitled action, and says: That on March 25, 1920, a jury duly impaneled in the above cause returned a verdict for the plaintiff for the sum of $7,500.00, and judgment was entered accordingly in favor of the plaintiff; that in the proceedings, instructions and judgment had in this cause, certain errors were committed to the prejudice of the defendant, all of which will in more detail appear from the assignment of errors, which is filed with this petition.

WHEREFORE, this defendant prays that a writ of error may issue in its behalf out of the United States Circuit Court of Appeals for the Ninth Circuit, for correction of errors so complained of, and that a transcription of the records of the proceed-

ings and the papers in this case duly authenticated may be transmitted to the said Circuit Court of Appeals.

FAVOUR & CORNICK,
Attorneys for Defendant.

Dated Aug. 26, 1920.

[Endorsement]: Petition for Writ of Error. Filed Aug. 28, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk.

Service of copy admitted this 26th day of August, 1920.

F. C. STRUCKMEYER,
R. B. WESTERVELT,
Attorneys for Plaintiff. [54]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Assignment of Errors.

Comes now defendant, United Verde Extension Mining Company, and files herewith its following assignment of errors in connection with and as a part of its petition for a writ of error filed herein,

which it avers were committed by the Court in the proceedings in this cause, or otherwise committed in said proceedings, before and after the rendition of the judgment appearing in the records herein, and upon which assignment of errors defendant relied in the prosecution of the writ of error in the above-entitled cause from the said judgment herein entered.

I.

The Court erred to the prejudice of the defendant in overruling and denying defendant's motion that plaintiff be required to give security for costs, for the reason that the defendant had complied with all the requirements of the law of Arizona and under said laws the granting of the motion was mandatory, and there is no other or contrary rule of the United States District Court for the District of Arizona.

II.

The Court erred to the prejudice of the defendant in permitting the plaintiff to elect to proceed under the Employers' Liability Law of Arizona and in failing to sustain the defendant's [55] demurrer to the complaint, which joined an action *ex contractu* and an action *ex delicto;* for the reason that the said complaint attempted to state two causes of action inconsistent with each other and joined two alleged causes of action prohibited to be joined by the laws of Arizona.

III.

Prejudicial and reversible error to the prejudice of the defendant occurred and was committed when the attorney for the plaintiff offered (page 4, Bill

of Exceptions) as evidence certain alleged X-ray plates under circumstances raising the evident purport without proof, that said photographs were of plaintiff and showed plaintiff's condition, but which were not taken by and had not been developed by the plaintiff's expert witness or any other witness; for the reason that the attempt to introduce and offer was wholly unwarranted and the objection sustained by the Court which was necessary to the said totally unauthenicated and inadmissible evidence, because to fail to make objection would have been inexcusable, inevitably and manifestly raised in the minds of the jury the conclusion that the defendant sought to keep the said plates out, because they were photographs of plaintiff's alleged injuries and would reveal conditions damaging to the defendant; and the Court erred in refusing a new trial on account of this conduct of the attorney for the plaintiff prejudicial to defendant, if for no other reason.

IV.

Prejudicial and reversible error to the prejudice of the defendant was committed when the attorney for the plaintiff added the following comment (page 4, Bill of Exceptions), "That is, provided there was anything to testify about," to the following quoted answer of plaintiff's expert witness in [56] response to a question why the physical examination of the plaintiff had been made a few days prior to the trial: "I presume that my examination was made to determine his condition for the purpose of testifying in this case"; for the reason that said comment conveyed to the minds of the jury without

evidence to support, that the physican had found a very bad condition, else he would not have been called to testify; and the Court erred in denying defendant's motion for a new trial on account of this aforesaid reversible error and conduct on the part of the attorney for the plaintif, if for no other reason.

V.

The Court erred to the prejudice of the defendant in admitting (pages 5 and 6, Bill of Exceptions) as evidence the American Mortality Tables offered by the plaintiff; for the reason that no evidence was introduced in regard to the habits, conditions of living and social surroundings of the plaintiff.

VI.

The Court erred to the prejudice of the defendant in admitting (pages 5 and 6, Bill of Exceptions) as evidence the American Mortality Tables offered by the plaintiff; for the reason that no evidence was introduced to show that the plaintiff had suffered any permanent injury as a result of the alleged accident.

VII.

The Court erred to the prejudice of the defendant in admitting (pages 5 and 6, Bill of Exceptions) as evidence the American Mortality Tables offered by the plaintiff; for the reason that the said Tables based upon figures or statistics to show the expectancy of life of the average man [57] or selected risks, were not shown to be applicable to the expectancy of life or of work of plaintiff who was engaged in a hazardous occupation.

VIII.

The Court erred to the prejudice of the defendant in admitting (pages 5 and 6, Bill of Exceptions) as evidence the American Mortality Tables offered by the plaintiff; for the reason that no evidence was introduced or instructions given to the jury to enable said jury to intelligently, or in any way, understand the necessary modifications that should be taken into consideration or to inform them that they could disregard the said Tables entirely, even in cases where a permanent injury had been proved or there was evidence of such permanent injury.

IX.

The Court erred to the prejudice of the defendant in denying the motion of the defendant (page 11, Bill of Exceptions), that the jury be directed to return a verdict for the defendant, said motion having been made after all testimony was in and the defendant having excepted to the denial of its motion; for the reason that no evidence was introduced on behalf of the plaintiff, or otherwise, to show or tend to show that the plaintiff was not negligent and that the alleged accident was not occasioned by the negligence or the wilful intent and purpose of, or violation of warnings and instructions by, the said plaintiff.

X.

The Court erred to the prejudice of the defendant in instructing the jury as follows, over objection and exception of defendant (pp. 19 and 20, Bill of Exceptions), that the American Mortality Tables might be considered: [58]

> "The testimony in this case shows that the plaintiff is now forty-two years of age, and testimony has been received for the purpose of showing, or tending to show that the probable duration of life of a person forty-two years is 26.72 years. . . . Now, this testimony as to the plaintiff's age and his expectancy is based upon the American Mortality Tables which are framed upon the basis of the average duration of the lives of a great number of persons and it has been held that the rate to be derived from such tables may not be the absolute guide of the judgment and consciousness of the jury in a case of this character. They may be, however, considered by the jury in connection with all other evidence in the case,"

for the reason that there was no evidence of permanency of the alleged injury of plaintiff and the said tables were inadmissible as evidence.

XI.

The Court erred to the prejudice of the defendant in instructions concerning Mortality Tables in failing to charge that the said tables might be totaly disregarded; for the reason that the defendant objected and expected to (p. 20, Bill of Exceptions) the charge permitting consideration of mortality tables, and such instruction that the Tables may be totally disregarded, is requisite as a necessary modification or qualification, even in cases where mortality tables are considered to be admissible.

The Court erred to the prejudice of the defendant

in instructing the jury as follows (page 17, Bill of Exceptions) in reference to permanent injury:

> "And these Mortality Tables were admitted in evidence in this case in order to enable you to determine the probable duration of the plaintiff's life. It is stated that in action for personal injury, if the injury is of a permanent character, in estimating the damages the expectancy of life of a person injured is an essential element and to show such expectancy, standard Mortality Tables are admissible in evidence." [59]

for the reason that, while the statement may or may not be correct as a general statement of law, it presumes and gives the manifest and inevitable inference, that the injury in this case was permanent, else these tables would not have been admitted.

XIII.

The Court erred to the prejudice of defendant in giving the following instructions:

> "If you find for the defendant, you should award a fair and reasonable compensation taking into consideration what the plaintiff's income was, what it would probably have been, how long it would have lasted, whether he would have been regularly employed and able to perform labor; whether sickness might overtake him and he would thereby lose as a result thereof and all the contigencies to which he was liable, that is his earning capacity and then award such compensation as you think would be fair and just."

for the reason that said instruction is vague and for the further reason that it assumes a permanent injury and future incapacity of work as well as a past incapacity, and conveyed to the minds of the jury the specific idea that the injury was permanent and for the further reason that the comment of the Judge in answer to the exception taken by the defendant, "Well, if you or anyone else so understood me, I desire to correct it now because I didn't assume, because I don't assume that the plaintiff has been permanently injured or injured at all, that is a question for the jury," was not made a part of the charge and therefore would not qualify the instruction, and further the said comment, if assumed to be a qualification, would not cure the error, since no withdrawal or qualification was made of the instruction with reference to Mortality Tables and said Tables were not then excluded from evidence, notwithstanding the instruction of the Court that standard Mortality Tables are admissible, [60] "if the injury is of a permanent character," set forth in full in Assignment XII hereinabove.

XIV.

The Court erred to the prejudice of defendant in instructing the jury as follows:

> "The fact that the person injured or killed was engaged in a more hazardous employment than the persons with reference to whom the tables were made up, that is, the average man, is a circumstance—the average man of good health—is a circumstance to be taken into consideration by the jury as tending to show that his

expectancy of life, that is a man engaged in hazardous occupations was less than the tables would indicate to one of his age, but the tables are none the less admissible on that account,"

for the reason that the Mortality Tables are based upon average men of good health and do not apply to specific instances of hazardous occupations, and therefore not to this case.

XV.

Because the evidence at the trial was insufficient to justify the verdict, for the reason that there was no evidence introduced proving or tending to prove directly or by inference that the injury sustained by plaintiff was not caused by his own negligence or willful conduct, or violation of instructions and warning.

XVI.

Because the verdict and judgment entered thereon is against the law and unsupported by the evidence; for the reason that the verdict is excessive.

XVII.

The Court erred in denying the motion of defendant for a new trial by reason of the matters and things all and singular, set out in the foregoing assignment of errors, and contained in the motion for a new trial, all of which appear in the records of this cause, and especially because [61] excessive damages appear to have been given under the influence of passion or prejudice.

WHEREFORE, the defendant prays that for

said manifest errors, the judgment of the Court should be reversed.

FAVOUR & CORNICK,
Attorneys for Defendant.

Dated, August 26, 1920.

[Endorsements]: In the District Court of the United States for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Assignment of Errors. Service of copy admitted this 26th day of August, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed Aug. 28, 1920, C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [62]

Bond on Appeal.

KNOW ALL MEN BY THESE PRESENTS: That we, United Verde Extension Mining Company, a corporation, as principal, and Hartford Accident and Indemnity Company, a corporation organized and existing under the laws of the State of Connecticut and authorized to transact surety business in the state of Arizona, as sureties, are held and firmly bound unto Mike Koso, defendant in error, in the full sum of Eight Thousand Five Hundred Dollars ($8,500.00), the same being the amount of the bond fixed by the District Court of the United States, for the District of Arizona, by order duly entered on the records of said court on the 6th day of July, 1920, to be paid to the said defendant in error, his legal

representative, executor, administrator or successor, to which payment, well and truly to be made, we bind ourselves, and our and each of our successors, heirs, executors, administrators and legal representatives, jointly and severally, by these presents.

Sealed with our seals and dated this 3d day of August A. D. 1920.

WHEREAS, on the 25th day of March, A. D. 1920, at the District Court of the United States, for the District of Arizona, in a suit pending in said court, between Mike Koso, plaintiff, and United Verde Extension Mining Company, defendant, a judgment was rendered in favor of plaintiff and against the said defendant, for the sum of Seven Thousand Five Hundred Dollars ($7,500.00), together with the sum of Forty-five and 70/100 Dollars ($45.70), costs of action, and the said defendant has obtained a writ of error to reverse said judgment in the aforesaid action, and filed a copy thereof in the clerk's office of said Court, and a citation directed to the said Mike Koso, [63] plaintiff, citing and admonishing him to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at San Francisco, State of California.

NOW, THEREFORE, the condition of the obligation is such that if the said United Verde Extension Mining Company shall prosecute said writ of error to effect, and answer all judgments and costs if it fail to make said plea good, then the above obli-

gation to be void, else to remain in full force and effect.

UNITED VERDE EXTENSION MINING COMPANY,

By (Signed) L. A. KEHR,
Principal,

[Seal] Attest: (Sgd.) C. P. SANDS,
Secty.

HARTFORD ACCIDENT AND INDEMNITY COMPANY,

By (Signed) JOSEPH H. MORGAN,
Attorney in Fact,

Attest: (Signed) F. G. BROWN, [Seal]
Attorney in Fact,
Sureties.

State of Arizona,
County of Yavapai,—ss.

On the —— day of ————, 1920, personally appeared before me ———— and ————, respectively, known to me to be the persons described in and who duly executed the foregoing instrument as parties thereto and respectively acknowledged, each for himself, that they executed the same as their free act and deed, for the purposes therein stated.

And the said ———— and ————, being by me duly sworn, says, each for himself and not one for the other, that he is a resident [64] and householder of the said County of Yavapai, and that he is worth the sum of Eight Thousand Five Hundred Dollars ($8,500.00) over and above his

just debts and legal liabilities and property exempt from execution.

_____

_____

Subscribed and sworn to before me this —— day of ————, A. D. 1920.

_____,

Notary Public.

My commission expires ————.

The within bond is approved both as to sufficiency and form, this 31 day of August, 1920.

WM. H. SAWTELLE,

Judge.

[Endorsements]: United Verde Extension Mining Company, a Corporation, Principal, and Hartford Accident and Indemnity Company, a Corporation organized and existing under the laws of the State of Connecticut and authorized to transact surety business in the State of Arizona, Sureties. Bond. Service of copy of bond admitted this 26th day of August, 1920. R. B. Westervelt, F. C. Struckmeyer. Filed August 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [65]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Order Approving Bill of Exceptions.

The defendant, having served a copy of its proposed bill of exceptions upon the plaintiff, the said bill of exceptions having been duly filed and the counsel for the plaintiff not having made any suggestions or correction thereof, it is hereby certified that the said bill of exceptions is a full, complete and correct abstract of all the testimony introduced by the parties on the hearing of the cause, and constitutes all the testimony therein and contains the instructions of the Court and the exceptions to said instructions and correctly states the exceptions to the offering of introduction of and admitting of evidence and to rulings of Court as are therein set forth, and it is

ORDERED, that the said bill of *exceptions and* it hereby is approved, settled and allowed this 31st day of August, 1920.

WM. H. SAWTELLE,

Judge.

[Endorsements]: Service of copy admitted this 26th day of August, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [66]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Order Allowing Writ of Error.

This matter coming on this day regularly to be heard upon application of the defendant, by its attorneys, for the allowance of a writ of error, upon its petition presented to the Court praying for the allowance of a writ of error on the assignment of errors intended to be urged by it and praying also that a transcription of the record and proceedings and papers from which the judgment was entered, duly authenticated, may be transmitted to the United States Circuit Court of Appeals for the Ninth Circuit, and that such other and further proceedings may be had as may be proper in the premises.

On consideration thereof, the Court does allow Writ of Error, the plaintiff having given bond regularly approved and filed in the sum of $8,500.00.

WM. H. SAWTELLE,
Judge.

Dated, August 31, 1920.

[Endorsements]: Service of copy admitted this 26th day of August, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [67]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Writ of Error. (Copy)

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the aforesaid District Court before you, be-

tween Mike Koso, plaintiff, and the United Verde Extension Mining Company, a corporation, defendant, a manifest error has happened to the great damage of the said defendant, as by its complaint and assignment of errors appears, we being willing that error, if any there has been shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at San Francisco, California, in said Circuit within thirty (30) days of the date of this writ, in said Circuit Court of Appeals, to be then and there held, that the records [68] and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 31st day of August, 1920, and of the Independence of the United States the one hundred and forty-fourth.

[Seal] C. R. McFALL,
Clerk.
By Clyde C. Downing,
Deputy.

Allowed Aug. 31, 1920.

WM. H. SAWTELLE,

Judge.

[Endorsements]: In the District Court of the United States in and for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation. Writ of Error. Copy served this —— day of August, 26, 1920, and accepted. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [69]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Citation on Writ of Error. (Copy).

The President of the United States to Mike Koso and to F. C. Struckmeyer, W. L. Barnum and R. B. Westervelt, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be

holden at the city of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein the United Verde Extension Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court, this 31 day of August, 1920, and of the Independence of the United States the one hundred and forty-fourth.

WM. H. SAWTELLE,
United States District Judge for the District of Arizona. [70]

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Phoenix, Az., Sept. 2, 1920, and executed the same Sep. 2, 1920, at Phoenix, Az., by delivering a true copy to F. C. Struckmeyer, personally.

J. P. DILLON,
U. S. Marshal.
By C. V. Culp,
Deputy.

Filed Sept. 2, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk.

[Endorsements]: In the District Court of the United States for the District of Arizona. Mike

Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Citation. Service of copy admitted this 26th day of August, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff. Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [71]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of the United States District Court for the District of Arizona:

You will please prepare a transcript of the complete record in the above-entitled cause to be filed in the office of the clerk of the United States Circuit Court of Appeals for the Ninth Circuit under the writ of error to be perfected to said Court in said cause and include in said transcript the following proceedings, pleadings, papers, records and files, to wit:

Judgment-roll.

Notice of Motion for Security of Costs.

Motion and Affidavit for Security for Costs.
Order Overruling Defendant's Demurrer.
Transcript of all Minute Entries.
Motion for New Trial.
Order Extending Time to File Bill of Exceptions.
Bill of Exceptions.
Acknowledgment of Service of Bill of Exceptions.
Stipulations that Orders may be Made in California.
Order Allowing Bill of Exceptions.
Petition for Writ of Error.
Assignment of Errors.
Order Allowing Writ.
Order Fixing Bond.
Bond on Writ of Error.
Writ of Error.
Citation.
Praecipe for Transcript.

and all other records, entries, pleadings, proceedings, papers and files necessary and proper to make a complete record upon said writ of error in said cause.

Said transcript to be prepared as required by the law and the rules of this Court and the rules of the said United States Circuit Court of Appeals for the Ninth Circuit.

FAVOUR & CORNICK,
Attorneys for Defendant.

[Endorsement]: Praecipe. Service of copy admitted the 27th day of August, 1920. F. C. Struck-

meyer, R. B. Westervelt, Attorneys for Plaintiff. Filed Aug. 28, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [72]

In the District Court of the United States in and for the District of Arizona.

L.-45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Order Enlarging Time to and Including November 1, 1920, to File Record and Docket Cause.

On consideration of the application of C. R. McFall, Clerk of the United States District Court for the District of Arizona, and good cause appearing therefor,—

It is ORDERED that the time within which the original certified transcript of the record in the above-entitled cause may be filed and within which the cause may be docketed with the Clerk of the United States Circuit Court of Appeals for the Ninth Circuit at San Francisco, California, be, and the same is extended and enlarged to and including the 1st day of November, 1920.

Dated at Tucson, Arizona, this 28th day of September, 1920.

WM. H. SAWTELLE,
Judge of the United States Dist. Court for the Dist. of Arizona.

[Endorsements]: Filed September 28, 1920. C. R. McFall, Clerk. [73]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

United States of America,
District of Arizona,—ss.

I, C. R. McFall, Clerk of the District Court of the United States for the District of Arizona, do hereby certify that I am the custodian of the records, papers and files of the said United States District Court for the District of Arizona, including the records, papers and files in the case of Mike Koso, Plaintiff, vs. the United Verde Extension Mining Company, a Corporation, Defendant, said

case being No. 45–Prescott, on the docket of said court.

I further certify that the attached transcript contains a full, true and correct transcript of the proceedings in said case and of all papers filed therein together with the endorsements of filing thereon, as set forth in the praecipe filed in said case and made a part of the transcript attached hereto, as the same appears from the originals of record and on file in my office as such clerk in the city of Phoenix, State and District, aforesaid.

I further certify that the original writ of error and citation on writ of error are incorporated in said transcript of record.

I further certify that the cost of preparing and [74] certifying to said record amounts to the sum of Twenty-one and 50/100 Dollars, and that same has been paid in full by the plaintiff in error, United Verde Extension Mining Company, a corporation.

In testimony whereof, I have hereunto set my hand and affixed the seal of the United States District Court for the District of Arizona, at Phoenix, in said District, this 30th day of September, 1920, and of the Independence of the United States of America the one hundred and forty-*fifth*.

[Seal] C. R. McFALL,
Clerk United States District Court, District of Arizona. [75]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Writ of Error. (Original)

The President of the United States to the Honorable Judge of the United States District Court for the District of Arizona, GREETING:

Because in the records and proceedings, as also in the rendition of the judgment, of a plea which is in the aforesaid District Court before you, between Mike Koso, plaintiff, and the United Verde Extension Mining Company, a corporation, defendant, a manifest error has happened to the great damage of the said defendant, as by its complaint and assignment of errors appears, we being willing that error, if any there has been shall be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with the things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this Writ, so that you have the same at San Francisco,

California, in said Circuit within thirty (30) days of the date of this Writ, in said Circuit Court of Appeals, to be then and there held, that the records [76] and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error what of right and according to the law and customs of the United States shall be done.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court of the United States, this 31st day of August, 1920, and of the Independence of the United States the one hundred and forty-fourth.

[Seal] C. R. McFALL,
Clerk.
By Clyde C. Downing,
Deputy.

Allowed Aug. 31, 1920.
WM. H. SAWTELLE,
Judge. [77]

[Endorsed]: In the District Court of the United States in and for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation. Writ of Error. Copy served this —— day of August, 1920, and accepted. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff.

Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [78]

In the District Court of the United States in and for the District of Arizona.

No. 45 (PRESCOTT).

MIKE KOSO,

Plaintiff,

vs.

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Defendant.

Citation on Writ of Error. (Original).

The President of the United States to Mike Koso, and to F. C. Struckmeyer, W. L. Barnum and R. B. Westervelt, Your Attorneys, GREETING:

You are hereby cited and admonished to be and appear at the session of the United States Circuit Court of Appeals for the Ninth Circuit, to be holden at the city of San Francisco, California, in said Circuit, within thirty (30) days from the date hereof, pursuant to the writ of error filed in the clerk's office of the District Court of the United States for the District of Arizona, wherein the United Verde Extension Mining Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

WITNESS the Honorable EDWARD D. WHITE, Chief Justice of the Supreme Court, this 21 day of August, 1920, and of the Independence of the United States the one hundred and forty-fourth.

WM. H. SAWTELLE,
United States District Judge for the District of Arizona.

UNITED STATES MARSHAL'S RETURN.

I received the within writ at Phoeniz, Az., Sept. 2, 1920, and executed the same Sep. 2, 1920, at Phoeniz, Az., by delivering a true copy to F. C. Struckmeyer personally.

J. P. DILLON,
U. S. Marshal.
By C. V. Culp,
Deputy.

Filed Sept. 2, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [79]

[Endorsed]: In the District Court of the United States in and for the District of Arizona. Mike Koso, Plaintiff, vs. United Verde Extension Mining Company, a Corporation, Defendant. Citation. Service of copy admitted this 26 day of August, 1920. F. C. Struckmeyer, R. B. Westervelt, Attorneys for Plaintiff.

Filed Aug. 31, 1920. C. R. McFall, Clerk. By Clyde C. Downing, Deputy Clerk. [80]

[Endorsed]: No. 3580. United States Circuit Court of Appeals for the Ninth Circuit. United Verde Extension Mining Company, a Corporation, Plaintiff in Error, vs. Mike Koso, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States District Court of the District of Arizona.

Filed October 2, 1920.

F. D. MONCKTON,

Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,

Deputy Clerk.

No. 3580

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

MIKE KOSO,

Defendant in Error.

BRIEF OF PLAINTIFF IN ERROR

Upon Writ of Error to the United States District Court of the District of Arizona.

FAVOUR & CORNICK, of Prescott, Arizona,
Attorneys for Plaintiff in Error.

Filed this.....day of....., 1921.

.....
Clerk U. S. Circuit Court of Appeals.

Service of copy of within Brief is acknowledged this.....day of January, 1921.

.....
Attorneys for Defendant in Error.

Courier—Prescott, Ariz.

CONTENTS.

No. 3580

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING CO., a Corporation,
Plaintiff in Error,
vs.
MIKE KOSO,
Defendant in Error.

BRIEF FOR PLANTIFF IN ERROR

Note: The Transcript of Record will be referred to herein as "Tr.," giving page number.

STATEMENT OF CASE.

Mike Koso, a citizen of Finland, Russia, instituted this action in the United States District Court of Arizona, in March, 1918, against the United Verde Extension Mining Company, to recover damages for injuries alleged to have been received on the first day or night of his employment in a drift on the 1200 level in the mine of the Company at Jerome, Arizona. Koso alleged that some rock or earth fell upon his back when he was shoveling in said drift where he had been directed to work, and that it "cut, bruised, broke and mangled plaintiff's shoulder, back and foot." The complaint set up two separate counts; the first count alleged that the

accident occurred in the course of his employment in a hazardous occupation, and was due to a condition or conditions of the employment, and purported to state a cause of action under the Employer's Liability Law of Arizona, on account of injury received as a result of an unavoidable accident due to an inherent risk of a hazardous occupation. (Tr. 1 to 4). The second count alleged that the accident occurred because the Company negligently failed to timber the drift, which was negligently left in an unsafe condition, and but for said negligence Koso would not have received the alleged injury. (Tr. 4 to 6).

The plaintiff in error, within the time for answering, filed its demurrer to the whole complaint on the ground that the said complaint purported to state two causes of action, one ex contractu and one ex delicto, united in one cause, contrary to the laws of Arizona, and upon the ground that the said Employer's Liability Law was in violation of the Constitution of the United States. The plaintiff in error also filed its demurrer to each of the alleged causes of action, and filed its pleas in bar thereto. (Tr. 11). Thereafter and before any hearing or trial by the Court, the plaintiff in error filed its motion, supported by affidavit, that the defendant in error be required to give security for costs, which motion was overruled by the court. The plaintiff in error, by its counsel, was present on August 4th, 1919, at the adjourned term of the said court, prepared to proceed with the trial of the case,

but neither the plaintiff below nor his counsel were present or represented. Thereafter at the regular term of the said court, to-wit, on March 22nd, 1920, the said demurrers were called up by the court, and on motion of counsel for the defendant in error, the court ordered that the said defendant in error "elects to proceed under the first cause of action," and that the second cause of action be dismissed. The demurrer of the plaintiff in error to the said first cause of action was also ordered overruled. The plaintiff in error then and there excepted to the ruling of the court. (Tr. 18).

The cause was tried by a jury on March 25th, 1920. (Tr. 19). At the trial, the evidence (Tr. 34 to 37) showed that the defendant in error, Koso, had been employed by the Company, on December 14, 1917, and was working in the first shift of his employment, when the alleged accident occurred, on the morning of December 15th, 1917. That Koso had had eighteen years experience as a miner prior thereto; that he was working on this shift with two other miners, but was alone at the time the alleged accident occurred. Koso stated that he was bending to shovel, about fifteen feet from the face or end of the drift, when some rock fell on him and knocked him down; that after about fifteen minutes he got up and walked "against the wall" to the cage station and after about an hour he was put in the cage and taken to the surface, and walked with the help of another man to the dry-house where he was helped to take off his clothing and put on other

clothes, and taken to the hospital where he remained about two weeks, and then went to Phoenix, Arizona, where he had lived chiefly during the subsequent two years and more prior to the trial; that his shoulder blade and back had "changed a little better" and that he had done a "little easy work in a cigar store or pool hall," and "was able to do easy work but not hard work."

The foreman who was immediately in charge of Koso at the time of the accident, Sampson Jiles, testified (Tr. 41 to 43) he was not in the employ of the Company at the time of the trial, that he put Koso to work and instructed him to pick down the loose rock before shoveling, that the drift, about seven feet, ten inches high, was timbered with no open spaces to within three feet of its end; that in making his rounds, and going in the cage to the 1200 level he had seen Koso coming out alone, and when Koso told him that he had been hurt, the witness had gone up with him in the cage and to the dry-house; that Koso walked all the way without assistance and had undressed himself and taken a hot bath and re-dressed himself; that the witness had examined Koso's back and found scratches on his shoulder and red marks on his back, and had called an automobile and sent Koso to the hospital in accordance with orders that all cases, even of slight injury, should be sent to the hospital; that the witness afterwards went to the drift where the accident happened and found about a bushel of fine

waste at the end of the drift, containing no lumps as large as his fist.

The only medical testimony introduced by the defendant in error was that of his medical witness, Dr. Wylie, who stated that by looking through a fluroscope he observed (Tr. 38) "in the first place he has an hernia, a beginning hernia; a starting hernia on the right side. Hernia is another name for rupture. He has lost about fifty per cent of the power of his right hand. There has been an injury to the scapula or shoulder-blade. And there has been an injury to the fifth lumbar vertebra on the right side that has been repaired by nature, and a bony ridge thrown out connecting the fifth lumbar vertebra with the first sacral vertebra. The injury to the scapula, the bone injury, has united and there is more bony tissue there at the present time than there was before he was injured." "Q. What did that injury consist of?" "A. Fractures." This was all of the testimony given in regard to the physical condition of Koso, as alleged to have been determined by a medical examination. The quotations of Koso, hereinbefore set out, were pertinent statements made by him with respect to his physical condition. It will be observed that there is no allegation in the complaint that Koso was, at that time, suffering from hernia or any injury to either hand, or from injury in the said regions (Tr. 1 to 6) and there is no evidence whatever that these alleged conditions of hernia and of partial loss of power of the right hand were due to the

alleged accident, and further, the examination at which the facts alleged were discovered, was remote more than two years from the date of the accident, on account of which damages were sought to be recovered. The said medical expert specifically states that the injury to the fifth lumbar vertebra "has been repaired by nature" and that the bone injury to the scapula has united. The reply "fractures" is indefinite as to whether it was intended by the witness to refer to the scapula alone, or was intended to infer that there was a fracture of the vertebra. The medical testimony of two physicians was introduced by the plaintiff in error, and they were asked hypothetical questions as to the results that would follow a fracture of the scapula and a fracture of the fifth lumbar vertebra (Tr. 44 to 46). The uncontradicted testimony was that great pain would accompany any effort of a person to undress within two hours after a fracture of the scapula and at least temporary paralysis would follow any material fracture of the fifth lumbar vertebra and movement within two hours thereafter would be very labored, if not impossible. The cross-examination of counsel for defendant in error (Tr. 46) of one medical witness, Dr. Southworth, manifestly proceeded upon the theory that there might be a slight injury to the vertebra which would not cause paralysis or be important, and belittling the seriousness and importance of the injury to the vertebra. Not only was there no testimony at all proving or tending to prove that the injuries alleged in the

complaint to have been the result of the accident, permanently impaired the defendant in error, but the testimony of his own medical expert, above quoted, shows clearly that all of the injuries of which Koso complained in his cause of action had been repaired by nature. The testimony showed that Koso, by his attorney, had refused to be examined as to his physical condition when asked by the plaintiff in error, upon a deposition taken in or about August, 1918, a few months after the alleged accident (Tr. 37).

During the trial several prejudicial matters arose, as set forth in the Assignments of Errors (III. to XIV. Tr. 61 to 67) and the Specifications of Error, appearing hereinafter. Said matters included:

(1) An offer in evidence, in the presence of the jury, by counsel for the defendant in error, of incompetent and unauthenticated X-Ray plates, excluded by the Court upon objection, but manifestly without curing and without the possibility of curing the erroneous impression conveyed by said unwarranted offer, that the said plates contained damaging evidence favorable to the defendant in error.

(2) The remark of counsel for the defendant in error that his medical witness, Dr. Wylie, had made examination just before the trial in order to testify, "provided that there was anything to testify about," which manifestly conveyed to the jury unwarrantedly, and without evidence to support, the conclusion or inference that the witness would not

have testified unless there was a very serious injury, due to the accident. (Tr. 38).

(3) The introduction, over objection of plaintiff in error, of American Mortality Tables, without evidence or proof of their applicability or evidence of previous life and habits, or of permanent injury resulting from the accident.

(4) The instructions by the court permitting the jury to consider the Mortality Tables and presuming permanency and future damages, which instructions were excepted to by the plaintiff in error.

At the close of the evidence the plaintiff in error moved the court to direct the jury to return its verdict for the defendant, which motion was denied. The jury returned the verdict for the defendant in error in the sum of $7500. Judgment was entered thereupon. Thereupon plaintiff in error, in due time moved for a new trial on various grounds, including those of excessive damages, insufficiency of evidence, and errors of law in admitting Mortality Tables and permitting the jury to consider them (Tr. 25), which motion was taken under advisement by the court April 20th, 1920 (Tr. 28), and thereafter on June 21st, 1920, the court overruled said motion, to which ruling exception was allowed. Thereupon in due course the plaintiff in error presented its Bill of Exceptions which was duly approved and allowed by the Judge of the District Court (Tr. 35 to 59) and filed its petition for Writ of Error and its Assignments of Errors (Tr. 59 to 69); and a Writ of Error was allowed to bring this cause up for review. (Tr. 74).

SPECIFICATIONS OF ERROR.

I.

The court erred in overruling the motion of the plaintiff in error that the defendant in error be required to give security for costs (Tr. 13 and 17), for the reason that the law directs the granting of such a motion when supported by affidavit, and a denial thereof deprived the plaintiff in error of its right under the law to endeavor to protect itself from expenses of court costs. (Assignment of Error I. Tr. 61.)

II.

The court erred in overruling the demurrer interposed to the complaint upon the ground that said complaint attempted to join an action ex contractu with an action ex delicto (Tr. 9), and in permitting the defendant in error to elect to proceed and to proceed under the Employer's Liability Law of Arizona (Tr. 18), for the reason that under the law of Arizona the time allowed for election had expired, and moreover an election had been made at the time of instituting suit, to which ruling the plaintiff in error duly excepted.

III.

Prejudicial and reversible error occurred when counsel for the defendant in error offered as evidence, without authentication or proof, X-Ray plates (Tr. 38 and 61), under circumstances raising the evident purport that said plates were photographs of portions of the defendant in error; the

medical expert of the defendant in error testified that the X-Ray plates were taken under his direction; counsel for defendant in error then stated: "We offer those X-Rays, if your Honor pleases, photographs, as an aid, and illustrative of the testimony of the witness to be given." Mr. Cornick, on behalf of plaintiff in error, "He took these and developed them himself," to which Mr. Struckmeyer answered, "No, they were not developed by him"; Mr. Cornick, "We object then." The objection was sustained. This erroneous and unwarranted offer of unauthenticated X-Ray plates, without competent proof or evidence to show that they were photographs of the defendant in error, or authenticated in any manner, was prejudicial error because the jury manifestly received the inference that the plates were being kept out to conceal some damaging condition. (Assignment of Error III.) And prejudicial error occurred as follows, to-wit:

The aforesaid medical expert testified, (Tr. 37): "I presume my examination was made to determine his condition for the purpose of testifying in this case"; Mr. Struckmeyer, "That is provided there was anything to testify about"; Mr. Cornick, "We object to that"; for the reason that the remark of the counsel of the defendant in error, Mr. Struckmeyer, was self-serving and gratuitous, and could not be objected to until after it was made, and it conveyed to the jury the plain inference, without evidence or proof, and prejudicial to the plaintiff in error, that the fact the witness was called to tes-

tify proved that he had found a serious condition. (Assignment of Errors III. and IV.)

IV.

The court erred in admitting, over objection of plaintiff in error, American Mortality Tables as evidence, and in permitting them to be considered and argued, for the reason that their applicability to the defendant in error was not shown, there was no proof of the tables, and there was no evidence of permanent injury. (Assignment of Errors, V, VI, VII, and VIII.)

V.

The court erred in denying the motion of the plaintiff in error at the close of the evidence that the jury be directed to return a verdict for the said plaintiff in error (Tr. 64), for the reason that there was no evidence showing that the defendant in error was not negligent and that the accident was not due to his own negligence, to which ruling the plaintiff in error duly excepted. (Assignment of Error IX.)

VI.

The court erred in instructing the jury, over objection of the plaintiff in error, that American Mortality Tables might be considered, as follows:

> "The testimony in this case shows that the plaintiff is now forty-two years of age, and testimony has been received for the purpose of showing, or tending to show that the probable duration of life of a person forty-two

> years is 26.72 years.....Now, this testimony as to the plaintiff's age and his expectancy is based upon the American Mortality Tables which are framed upon the basis of the average duration of the lives of a great number of persons and it has been held that the rate to be derived from such tables may not be the absolute guide of the judgment and consciousness of the jury in a case of this character. They may be, however, considered by the jury in connection with all other evidence in the case,"

for the reasons set forth in Specification of Error IV above, to which instructions the plaintiff in error duly excepted.

VII.

The court erred, if said Mortality Tables were admissible at all, which plaintiff in error does not admit but specifically denies, in failing to instruct the jury that the Mortality Tables might be totally disregarded in cases where they were otherwise admissible for consideration, and in instructing the jury as follows, to-wit:

> "And these Mortality Tables were admitted in evidence in this case in order to enable you to determine the probable duration of the plaintiff's life. It is stated that in an action for personal injury, if the injury is of a permanent character. in estimating the damages the expectancy of life of a person injured is an essential element and to show such expectancy, standard Mortality Tables are admissible in evidence."

for the reason that the instruction that Mortality

Tables may be disregarded entirely is a necessary modification, and the instruction quoted assumes the permanency of the injury by its very statement that "if the injury is of a permanent character.... standard Mortality Tables are admissible in evidence," to which instructions plaintiff in error duly excepted.

VIII.

The court erred in instructing the jury (Tr. 67) as follows:

> "The fact that the person injured or killed was engaged in a more hazardous employment than the persons with reference to whom the tables were made up, that is, the average man, is a circumstance—the average man of good health—is a circumstance to be taken into consideration by the jury as tending to show that his expectancy of life, that is a man engaged in hazardous occupations was less than the tables would indicate to one of his age, but the tables are none the less admissible on that account,"

for the reasons stated in Assignment of Error XIV.

The instruction outrightly charges the jury that the Tables might be considered even where these Tables and the basis upon which they are made up are inapplicable to the individual whose case is in question; to which instructions plaintiff in error duly excepted.

IX.

The court erred in instructing the jury as follows, to-wit:

> "If you find for the plaintiff, you should award a fair and reasonable compensation taking into consideration what the plaintiff's income was, what it would probably have been, how long it would have lasted, whether he would have been regularly employed and able to perform labor; whether sickness might overtake him and he would thereby lose as a result thereof and all the contingencies to which he was liable, that is his earning capacity, and then award such compensation as you think would be fair and just,"

for the reason that it charged the jury to consider all the elements of a future permanent damage "if you find for the plaintiff," and the charge that the jury consider what his income probably would have been is speculative, to which instructions plaintiff in error duly excepted. (Assignment of Error XIII.)

X.

The verdict and the judgment thereon are each and both against the law and not sustained by the evidence, by reason of the matters and things set forth in Specifications of Errors, I to IX herein.

XI.

The court erred in denying the motion of plaintiff in error for a new trial (Tr. 29 and 68) for all the grounds set forth in the said motion and by reason of the excessive damages awarded the defendant in error. (Assignment of Error XVII.)

ARGUMENT.

Specification of Error I.

The Court erred in overruling the motion that the defendant in error be required to give security for costs (Tr. 13) as is required of plaintiffs not owning property within the State of Arizona. The law of Arizona provides that where it appears by affidavit that the plaintiff is a non-resident of the state, or is not the owner of property out of which costs could be made by execution sale, the Court shall order the plaintiff to give security for costs. There is an exception to this general requirement, but that exception does not affect this case. A motion was made in this cause by the plaintiff in error, supported by affidavit, in the form upon which orders requiring security for costs have been made in the Superior Court of Yavapai County. If there is to be any specific form of affidavit, it is submitted that the law or a rule of the District Court should so specify, but there is no such specific requirement. It would be impossible for an affiant to make a truthful affidavit in which he would unreservedly state that a certain plaintiff had no property in the state; the manifest intention of the law is that an affiant should state this fact truthfully, and therefore upon information and belief, showing that a reasonable effort had been made to ascertain the fact. Good faith requires that affiant should be encouraged and required to make oath only to what he can state truthfully. It is a

mere subterfuge for a plaintiff to be allowed to challenge the form of an affidavit when he could make oath affirming or denying that he was the owner of property; and if he is such owner, then good faith requires that he so admit instead of refusing to divulge.

The defendant was prejudiced by the denial of the Court of its motion for security for costs (Tr. 17), because it was quite possible that the plaintiff would not give such security or conform to the law, and the case might have been dismissed on that account in accordance with the provisions of the law and the outcome of said case might have been totally different.

Silvas v. Arizona Copper Company, 220 Fed. 116.

Tolman v. S. B. and New York R. R., 92 N. Y. 354.

Banes v. Rainey, 192 N. Y. 286.

Meade Bank v. Bailey, (Cal.) 70 Pac. 297.

The Silvas case was one in which suit was brought by a guardian, and this Court held that the guardian came under the exception to the law; the clear conclusion is that in cases where this exception would not aply, security must be given, under Section 643, R. S. A., 1913, which provides that at any time before trial, on motion of the defendant, supported by affidavit, showing that the plaintiff is a non-resident, or is not the owner of property out of which costs could be made, the Court shall order the plaintiff to give security for costs.

In the Banes case the Court construes the law of New York to be a matter of right for the defendant and to require that security for costs be given, and likewise in the Meade Bank case, the Court construes a statute which provides that costs "may be required by the defendant" as vesting "in the defendant the right to have the bond, and the Court cannot, against his will, deprive him of that right."

Specification of Error II.

The Court erred in overruling or failing to act upon the demurrer (Tr. 9) interposed by the defendant below to the whole complaint and in allowing the plaintiff below to elect to proceed (Tr. 18) under the Employer's Liability Law. The complaint contains one cause or count purporting to be based upon the Employer's Liability Law of Arizona, and another count based upon Common Law Negligence, and states facts to show that the accident was due to some defect or negligence. The defendant's demurrer should have been sustained and the plaintiff required to proceed, if he proceeded at all, upon the Common Law Negligence count, treating as immaterial the allegations inconsistent therewith, for the following reasons:

The Statute of Arizona requires that election of the particular remedy, (three of which are available to an employee) is to be made by the employee by bringing suit. An employee may put off his election, but certainly not beyond the two-year limitation

provided in the statutes. The law contemplates and requires that an employee must institute and prosecute a suit within the two-year limitation on the remedy he elects, and it necessarily follows that he must make an election within that period. When an employee attempts to bring an action setting up two of the remedies, as in this case, he evidently does not intend to make an election, but on the contrary seeks to avoid making any specific election. If he is permitted to thus avoid or be held to avoid an election, and is permitted to make his election more than two years after the cause of action has accrued, as was done in this case, the cause having accrued in December, 1917, and an election having been permitted in March, 1920, then the law and the limitation is made ineffective, is violated and is made void, when a reasonable construction could be given that would make the law effective in such case, to-wit, the plaintiff could, and should have been held to have made his election at the time of the institution of the suit (as is contemplated and required by law), and if his complaint attempts to allege two inconsistent causes of action, the Court should determine from the facts stated in the complaint as a whole, which cause, negligence or otherwise, the facts tend to support and should rule that such cause had been elected, and should require the plaintiff to proceed thereunder, and hold that the limitations had run as against any other remedy or election where two years shall have passed as in this case. It is submitted that the Court should not

have permitted the plaintiff to elect on March 25th, 1920, to proceed under the Employer's Liability Law; that the election was void because more than two years had elapsed from the time of the accident and the accruing of his right of action; but the Court should have sustained the defendant's demurrer and have ruled that the time for any attempt to elect had expired and that the facts alleged in the complaint as a whole showed the attempt to allege a Common Law Negligence case and therefore an intention or election to proceed thereunder and the plaintiff was bound thereby. This is so because the bases of the two counts are totally inconsistent, the one (Tr. 1) is based upon the allegation of a conclusion of the pleader that the accident was due to a condition of the employment in a hazardous occupation, while the other (Tr. 4) is based upon the allegation of **facts** showing the cause of the accident was that it was due to the negligence of the defendant and "but for said negligence of defendant, said injuries would not have been received." If an action is due to acts of negligence, how can it be due to a condition of the employment in a hazardous occupation and to a danger inherent therein and unavoidable as provided in the Employer's Liability Law? It is to be assumed that a plaintiff in pleading facts considers them to be true or at least believes them to be true. The **facts** alleged should determine the kind of action. Taking the complaint as a whole in this case, the facts clearly show that if there is any cause of action it is one

based upon an accident due to negligence (Tr. 5) and not to an unavoidable condition of a hazardous occupation. It is submitted therefore that the Court, since more than two years had elapsed from the accrual of the right of action, should have required the plaintiff to proceed upon the Common Law Negligence action. In fact the plain declaration of the law of Arizona requires an election in all cases of personal injury when and by institution of suit and a logical interpretation would require that the institution of any suit for personal injury should be held to be the election of such remedy as the facts are determined by the Court to fit. All the more, should there be no construction of the law that will permit an election to be made after the two-year limitation has elapsed or permit the defendant to be kept in suspense as to what defense he will be called upon to make and thereby deprived prejudicially of his lawful right. Such a construction defeats the idea of law offering several remedies but providing and contemplating that any suit brought shall be held as an election.

Section 3176, R. S. A., see Appendix.

Consolidated Arizona v. Ujack, 15 Ariz., 388.

Section 710, R. S. A., 1913, provides:

> "There shall be commenced and prosecuted within two years after the cause of action shall have accrued, and not afterward, all actions or suits in court of the following description:

(1) Action for injuries done to the person of another."

Section 3162, see Appendix.

23 Cyc. 389:

> "A petition will not be regarded as stating more than one cause of action, for the reason that the facts are set out in different ways and the terms, like separate causes, when it is clear from the facts stated and the judgment demanded that but one cause of action exists."

Specification of Error III.

Prejudicial error occurred when the counsel for the plaintiff below made offer in evidence of unauthenticated X-Ray plates (Tr. 38). The interpretation of X-Ray plates is a matter requiring great care and expert knowledge and experience. Such plates, just as photograph plates may be developed so as to bring out certain features and tend to eliminate other features. These plates are taken so that they show only certain parts of the body, and the matter of identification of the plates as being photographs of a particular person therefore requires great care and is of exceeding importance. It is evident that these plates, if handled in development by several persons, might easily become mixed and even an expert could not identify them as being photographs of a part of the body of any particular person. It is also quite apparent that because of the practical impossibility of identification, plates depicting the condition of some other person might

be substituted, even when ordinary care was used in their handling. It seems apparent that the only method of authentication is to have proof made by the person who took the plates and developed them. It is certainly clear that there is not even the ground work of identification and authentication where plates are offered in evidence, to be interpreted by a witness who can only state that he had the plates developed, but did not take or develop them himself, and no witness is produced who developed such plates. The opportunities for an exchange of plates, error in development, and fraud and misrepresentation, are numerous under such circumstances.

In this cause the offer of X-Ray plates by the counsel of the plaintiff below, which said counsel and his expert witness knew had not been taken or developed by the latter, was made as evidence. The defendant below, through its counsel, immediately asked if the plates had been developed by the witness and when opposing counsel replied (Tr. 38) they had not been so developed, objection was promptly made and the Court excluded the plates, but this exclusion did not cure the prejudicial error against the defendant which this offer could not fail to have upon the jury. The very pointed inference the jury drew was that evidence relating to the plaintiff in the form of X-Ray photographs, was being kept from them and that on account of objection of the defendant below; whereas the fact was that the said defendant for its own protection

was compelled to object since without reasonable authentication which could not be given by the witness or the plaintiff, the plates might have been absolutely incorrect in their depiction of conditions, or might have been the plates of some other person. Without impugning the motives of the counsel in this case in any manner, in general if such an offer can be made when the counsel for the plaintiff knows that the plates are not authenticated, and if the sole remedy of the defendant is an objection, and to have the plates rejected by the Court, then it is submitted that when such a practice is established a plaintiff may, with practical impunity, make an offer of even blank plates or any kind of plates and secure a prejudicial effect on the jury's mind against the defendant, caused by the objection and rejection. There was no way in which the defendant could have prevented the offer except by objection or otherwise have avoided the effects upon the jury by reason of the circumstances surrounding the said offer. If the counsel of the plaintiff below had not known whether or not these plates were authenticated, it is submitted that he should have asked his witness the necessary preliminary questions to determine the facts and then have refrained from making any offer whatsoever, when it developed that they were not authenticated. However that may be the effect was secured to the great prejudice of the defendant. There is included in this specification to further indicate an effect prejudicial to the defendant below, as conveyed to

the jury by the offer and remarks of opposing counsel, the remark added by the said counsel to the testimony of his witness (Tr. 38) as supplementing the answer of his medical witness that the latter presumed his examination was made to determine his condition for the purpose of testifying; the said counsel added "that is provided there is anything to testify about." The plain effect upon the jury was that this witness would not have been called to testify unless he had found a very serious condition. It was for the jury to hear the testimony and the opinion, if such was asked, in proper form, of the witness, and to determine whether there was anything to testify about. The witness was not asked his opinion as to whether the condition was serious. The effect of this remark was therefore an incompetent and prejudicial opinion expressed by the counsel for the plaintiff below that the witness had found something to testify about, with the clear corollary that it was a serious condition. Whether this is reversible error or not, is a matter for discretion of this Court, but that it was prejudicial seems clear, the incident tending to emphasize the reversible error in offering the X-Ray plates, as above set out, which occurred a few minutes thereafter.

Cosselmon v. Dunfee, 172 N. Y. 507.

Iverson v. McDonnell, (Wash.) 78 Pac. 202.

Winters v. Sass, 19 Kansas 556.

In the Cosselmon case appeal was taken from

judgment for the plaintiff for personal injuries. Plaintiff's counsel had asked a witness whether the latter knew if the defendant carried accident insurance on employees. This was objected to and the objection sustained. The higher Court stated that while the trial court made a proper disposition of the matter, nevertheless the propounding of the question was calculated to convey to the jury an improper impression. The injury was not material and the practice of asking a question that counsel must be assumed to know cannot be answered is highly reprehensible, and where the trial court or the appellate court is satisfied that the verdict of the jury has been influenced thereby, it should for that reason set aside the verdict.

In the Iverson case the counsel for plaintiff asked a witness in regard to liability insurance; the Court states that even asking the question is reversible error, although the Court instructed the jury to disregard it; in order to protect the defendant, its counsel was forced to object and yet by so doing admitted the fact. This is the condition with regard to the objection to the offer of the X-Ray plates; the principle of the Iverson case is applicable, and also more forceful, because in our case the Court did not instruct the jury to disregard, although such instruction would not have eliminated reversible error.

In the Winters case Justice Brewer stated that whenever in the exercise of a sound discretion, it appears to the Court that the jury may have been

infuenced as to their verdict by such extrinsic matters, however thoughtlessly or innocently uttered, * * * then the verdict should be set aside.

Specification of Error IV.

The Court erred in admitting the American Mortality Tables (Tr. 39 and 40) as evidence over objection and exception of counsel for defendant below. The objection to the admission of these tables is upon two main grounds:

(1) That there was no evidence or proof showing the applicability of the tables to the particular plaintiff or case, and,

(2) There was no evidence of permanent injury and adequate evidence of such injury is a condition precedent to the admission of Mortality Tables in evidence under any conditions.

A careful review of many cases relating to admissibility of and instructions upon Mortality Tables shows that the cases which pass lightly upon the question of admissibility are those where this question was either taken for granted because of death or of an admittedly permanent injury or are decisions where the point was very lightly considered. It can be safely said that all the well considered cases dwell emphatically upon the uncertainty of the tables, the necessity of proof bringing the particular life within the class of lives upon which the particular table is based, the necessity of showing previous health, habits and social surroundings, the necessity of sufficient evidence of permanent

injury before the tables can even be admittd as evidence, and otherwise emphasizing the great opportunity for the jury to erroneously use the tables as generalizations and to supply proof of the expectancy of the particular life, and emphasizing the fact that the Court must exercise much care and caution in dealing with that sort of evidence. Wigmore states they are "among the least trustworthy of scientific evidence," and in Grier v. Louisville R. R., the Court comments upon the necessity of taking such evidence subject to the conditions surrounding the particular individual, and that the mere probable duration of life and not duration of ability to work is shown, and then states that on the whole it would be better if the jury were instructed to take into consideration other elements and not these tables.

(1) There was no evidence or proof showing that the Mortality Tables were applicable to the plaintiff below. It is manifest that a man following a hazardous occupation is not within the class of the selected lives upon which the American Mortality Tables are based. No attempt even was made to introduce proof bringing the plaintiff within that class and no evidence was introduced to show even broadly in what respect the fact that plaintiff followed a hazardous occupation would modify any applications of the tables to his case. The jury were instructed (Tr. 53) to consider the fact that the plaintiff was engaged in a hazardous occupation as tending to show that his expectancy would be

less than the tables, but there were no tables or evidence introduced to show how much less the expectancy of life would be, whether one year or ten years or more, and the jury had no intelligent basis whatever upon which to found any reasonable conclusion or to act other than upon pure conjecture and guess work. Further, there was no evidence introduced relative to the previous habits and social surroundings of the plaintiff below, which is necessary evidence to show whether or not he could bring himself within the class of selected lives in those respects. The judge of the trial Court showed appreciation of the deficiency of the evidence in this regard (Tr. 40) when he stated to counsel for the said plaintiff, "Yes, but there is one particular in which you haven't brought yourself within that rule, that is that you have not shown anything as to the plaintiff's previous habits * * *" and upon response of the said counsel inquiring whether the presumptions would not aid, the Court said, "Very well, I have ruled with you, so if you are willing to take the chance, very well."

To contend, as counsel for plaintiff did, that the presumptions as to habits would take the place of evidence, is to avoid the whole question and is directly contrary to authorities; there can be no such presumptions; affirmative evidence must be introduced to show the application of the tables to the particular life. If it were presumed that a man was healthy, had good habits and had normal social surroundings, and other features, the plaintiff

would have no case to prove whatever, but the authorities clearly show that affirmative proof of necessary facts is essential.

Kerrigan v. Pa. R. R., 44 A. 1069.

Rooney v. N. Y., N. H. & H. R. R., 58 N. E. 435.

Steinbrunner v. Pitts. Ry. Co. (Pa.), 28 Am. St. Rep. 806.

Ward v. Dampskibsselskabet, 144 F. 524.

City of Friend v. Ingersoll (Nebr.), 58 N. W. 281.

7 Ency. of Evidence, 426.

Kahn v. Herold, 147 Fed. 575.

Grier v. Louis. R. R. (Ky.), 42 Am. St. Rep. [illegible].

17 Corpus Juris 875, Note 84a.

Pauza v. Lehigh Valley Coal Co. (Pa.), 80 A. 1126.

(2) There was no evidence of permanent injury, which is a condition precedent to the admission of such tables. Before Mortality Tables are admissible as evidence in a case of personal injury where death does not result, there must be evidence of permanent injury. In MacGregor v. R. I. Co., 60 At. 761, the Court states:

> In case of injury resulting in the loss of an eye or limb, it is obvious that the element of permanency is necessarily implied, but there are many injuries, the description of which shows their permanency is merely probable and others where permanency is

> more improbable, but nevertheless within possibility; to be entitled to recovery for apprehended future consequences, there must be such degree of probability as amounts to reasonable certainty. A careful consideration of the medical testimony shows no evidence of permanency since no one of them (physicians) testified that their permanency is even probable. Their utmost claim is that the injury may last indefinitely. The admission of Mortality Tables was held improper and the judgment reversed with the statement that while it was not possible to determine accurately upon what testimony the jury based the verdict, if the amount is based upon permanent injury, it is sufficient to say the evidence does not warrant a finding of permanent injury.

This MacGregor case illustrates the rules laid down by other cases that the Court determines whether or not there is evidence of permanent injury and requires that there be such evidence before it will permit the introduction of Mortality Tables. Where the permanency of the injury is merely a probability or a possibility, there must be evidence to a reasonable certainty, and only the evidence of physicians can determine that point, as stated in the above quotation, and as stated in Filer v. N. Y. Central Railroad Company, "there is no evidence other than that of experts, by which courts and juries can determine whether a disease or an injury has been or can be permanently cured, or what its effect will be upon the health and capability of the injured person in the future." The only testimony with reference to the character and

extent of the injury to the plaintiff below was that of his expert witness and this has been set forth in full (Tr. 38). The only portion of the testimony which could be construed by conjecture to indicate, or to have been intended by the witness to indicate, any incorrect condition is the statement that the plaintiff had a starting hernia and had lost about fifty per cent of the power of his right hand. By no reasonable construction can these statements be stated to indicate to a reasonable certainty any evidence of permanent injury or any opinion by the witness that they were considered by him to be permanent, but regardless of that, this evidence was irrelevant and should not be considered because the plaintiff's complaint (Tr. 1 to 6) makes no allegation whatever of any injury to his hands or any hernia or injury of that kind or in that vicinity. Further, the examination occurred two years after the accident and was so remote that various conditions in no way attributable to the accident might have arisen. Even if it were reasonably possible to consider the hernia as an injury included among those alleged in the complaint, which it is not, there is even then no evidence or opinion of the witness that the said hernia was serious, or not removable by treatment, much less was there any evidence of the permanency or permanent incapacity. The remaining portion of the evidence of the physician showed clearly that the fractured condition had been repaired by nature and united, without any evidence whatever or any reasonable inference that

there was any serious, much less permanent injury or incapacity. An injury may be serious, but it is not for that reason permanent. The evidence of the plaintiff below was that within fifteen minutes after the accident he arose and walked, that he stayed in the hospital only about two weeks (Tr. 34 to 37), and the unrefuted testimony of the other physicians (Tr. 44 to 46) that a man suffering from any serious fracture of the fifth lumbar vertebra would have been partially, if not totally, paralyzed immediately after the fracture, corroborated and confirmed the testimony of the plaintiff's medical expert in relation to the repair by nature, if the said injury were in fact due to the accident. Also the plaintiff himself states in his testimony (Tr. 37) that he was better and had done easy work. The plaintiff in error therefore submits to this Court that there is no evidence of permanency of any injury alleged in the complaint to have been sustained as the result of the alleged accident, not a particle of evidence, and the rule of law is that there must be sufficient evidence, to a reasonable certainty. As stated in Pollock v. Pollock, 71 N. Y. 104, it is error of law to find a material fact when there is a total absence of evidence to sustain it. "Insufficient evidence is, in the eye of the law, no evidence." "When we say that there is no evidence to go to a jury, we do not mean literally none, but that there is none that ought reasonably to satisfy a jury that the fact sought to be proved is established." The Judge of the trial Court manifestly

took the position that it was for the jury to determine whether or not the evidence proved permanent injury or whether or not there was any evidence showing a permanent injury (Tr. 56 and 57) and he therefore admitted the tables in spite of the fact that there was no sufficient evidence of the permanency of the injuries alleged in the complaint to have been sustained as the result of the accident. The authorities show the rule to be that where there is conflict of testimony as to whether or not an injury is permanent, then the determination of that question is for the jury, and tables may be considered if properly introduced, only in the event the jury finds permanent injury. In this case there was not only no conflict of testimony, but there was no evidence of permanent injury.

Tweedy v. Inland Brewing Co. (Wash.), 134 Pac. 468.

Filer v. N. Y. C. R. R., 49 N. Y. 43.

MacGregor v. R. I. Co., 60 At. 761.

Mott v. Detroit G. H. & M. R. Co., 79 N. W. 3.

Leach v. Det. Elec. Co., 84 N. W. 316.

W. U. Tel. v. Morris, 83 Fed. 992 (C. C. A.)

Sax. v. Det. G. H. & M. R., 84 N. W. 314.

Tenney v. Rapid City (S. D.), 96 N. W. 96.

Foster v. Village of Bellaire, 86 N. W. 383.

Hardy v. Milwaukee St. Ry. Co., 61 N. W. 771.

St. L. & S. F. R. R. v. Nelson (Tex.) 49 S. W. 710.

Tex. Mex. Ry v. Douglas (Tex.), 7 S. W. 77.

City of Honey Grove v. Lamaster (Tex.), 50 S. W. 1053.

City of Friend v. Ingersoll (Nebr.), 58 N. W. 281.

Remsnider v. Union Sav. & Tr. Co. (Wash.), 154 Pac. 135.

City of Shawnee v. Slankaid (Okla.), 116 Pac. 803.

Thayer v. Den. & R. G. R. R. (N. Mex.), 154 Pac. 691.

Snyder v. Gt. Nor. Ry. (Wash.), 152 Pac. 703.

Specification of Error V.

The Court erred in denying the motion of the plaintiff in error for a directed verdict, because there was no evidence to show that the defendant in error was not negligent, or that his negligence did not cause the accident (Tr. 46 and 47). While it is true that under the Common Law there is a presumption against negligence in most cases, this action was prosecuted under a statutory remedy, and one of the necessary elements of this remedy is that the accident be not due to the negligence of the employee. (See Appendix.) To maintain his action under the statute, the plaintiff must allege and support by evidence all the elements required

by that statute to be alleged and proved, and one of those elements is allegation and proof that the plaintiff was not negligent, and this must be alleged and proved before recovery can be had under the statutory remedy, just as at Common Law a common carrier must prove that it was not negligent in order to relieve itself of responsibility and liability on account of loss of goods while in its possession.

Calumet and Arizona Mining Company v. Chambers (Ariz.), 177 Pac. 839.

Pollock v. Pollock (above).

Section 3158, R. S. A. (Appendix.)

The Warren Adams, 74 Fed. 413.

Hudson R. L. Co. v. Wheeler Eng. Co., 93 Fed. 374.

The Warren Adams, 74 Fed. 413.

Hudson R. L. Co. v. Wheeler Eng. Co., 93 Fed. 374.

St. Louis Cordage Co. v. Miller, 126 Fed. 508.

Specifications of Errors VI, VII and VIII.

These three specifications may be presented in conjunction, since they all relate to the instructions given by the Court with regard to Mortality Tables which instructions are set out verbatim therein. The defendant below objected to the admission of American Mortality Tables and excepted to the rule permitting their admission, and this exception would reach any instructions given or omitted to be

given in regard to this evidence erroneously admitted to the prejudice of the defendant. But specific objection was also made and exception allowed to the instructions of the Court in relation to Mortality Tables, and generally as presuming the permanency of the injury (Tr. 56 and 57). The authorities cited in the argument under Specification IV above show that the Court, by its very act of admitting these tables did in real effect, whether intentionally or not is immaterial, presume the permanence of the injury, or that there was sufficient evidence of permanency to raise a conflict of evidence thereon, since there must be evidence of permanent injury in order to warrant even the admission in evidence of such tables.

The whole tendency of the instructions of the Court, taken as a whole, and particularly with reference to Mortality Tables, showed an assumption that there was evidence of permanent injury, and further, the instructions set out in Specification No. IX show that the Court, in effect, assumed the fact of permanent injury. The remark of the Court to the objection made on this point by the plaintiff in error (Tr. 56) that the Court did not assume permanent injury, but that was a question for the jury, could not cure the erroneous instructions, (1) because the remark still assumed there was evidence of permanency and permitted the jury to consider the issue of permanency when there was no evidence, in law, to warrant such submission to the jury, and (2) because such general remarks do not

cure erroneous instructions; as stated in St. Louis I. M. & S. Ry. v. Needham, 52 Fed. 371, where the trial court had given instruction and of its own motion added a general statement modifying the charge, and the appellate court remarked, "this particular portion of the charge (the remarks), standing alone, is not objectionable; but general remarks of this character in the course of a charge, while they may tend to show the Court really entertains sound views of the law, do not extract the vice of an erroneous instruction, positive in its terms, which directs the jury to allow damages on a wrong basis."

Furthermore, in those cases where the facts are such that Mortality Tables are admissible, great care must be taken by the Court to see that evidence of all essential conditions exists in the case and to fully instruct the jury concerning the use of the tables and to instruct that the tables are not accepted as establishing the expectancy, but only as a possible aid in view of all the conditions surrounding the particular life in question; all the circumstances affecting the probable duration of life should be called to the attention of the jury in order that they may have an intelligent understanding of what their duty is in determining the life expectancy in the particular case, and the jury must be told that they are at liberty to disregard the tables altogether and arrive at a result independent thereof. Matters of this kind affecting the individual life in question must, as stated in several

of the authorities cited, be pointedly brought to the attention of the jury by instructions and a failure to do so is ground for reversal. The case of Florida Central Railroad v. Burney considers at length the matter of inadequate and erroneous instructions on Mortality Tables, and the Georgia Supreme Court sets forth therein forms for instructions on such tables for the use of courts and in order that instructions might, in the future, be adequate, and not give grounds for reversal on account of their insufficiency. An examination of these instructions shows that the instructions given by the Court in the present case are inadequate in most of the material and essential particulars, which the Georgia Court considered essential.

Vicksburg & Mer. R. R. v. Putnam (U. S.), 30 L. Ed. 257.

St. Louis I. M. & S. Ry. v. Needham, 52 Fed. 371.

Seigfred v. Pa. R. R., 55 A. 1061.

Steinbrunner v. Pitts Ry. Co. (above).

Florida Central R. R. v. Bruney, 98 Ga. 1, 26 S. E. 730.

Rooney v. N. Y. N. H. & H. R. R. (above).

Pauza v. Lehigh Valley Coal Co. (above).

Also authorities cited under Specification of Error IV, above.

Furthermore, the instruction in Specification of

Error VIII that the American Mortality Tables were made up on the basis of the "average man of good health" is incorrect and erroneous because those tables are not so made up, but are made upon the basis of selected risks. (Kerrigan v. Pa. R. R. and City of Friend v. Ingersoll, supra). This incorrect statement was prejudicial to the plaintiff in error because the jury were instructed in effect that the tables were made up on a basis more nearly applicable to the conditions of life expectancy of the defendant in error than they are in fact, and the Court emphasizes this prejudicial error in its instructions (Tr. 55, lines 7-8) by identifying plaintiff's life expectancy to be the same as that of the average man of forty-two years. When false impressions may have been raised in the minds of the jury by evidence or instructions, there should be a new trial. (McDaniel v. McDaniel, supra). The wording of this instruction to the effect that the fact a man is engaged in a hazardous occupation is a circumstance to be taken into consideration by the jury "as tending to show" that the expectancy of life of those in a hazardous occupation is less than the tables would indicate illustrates further the absolute indefiniteness and lack of any basis whatever, except unlimited conjecture and guess upon which the jury could rely in determining to what extent the fact of working in a hazardous occupation would lessen the life expectancy table for the said hazardous occupation. Under the instructions stating the fact as "tending" to show a less ex-

pectancy, the jury might have concluded that there was in fact no such lessening in case of hazardous employments. The fact is that the expectancy is positively less, else the Court would not be justified in making the modified instruction, but the question to be determined was how much less, and upon this point the jury had no evidence and instruction and were left to absolute conjecture and guess.

Specification of Error IX.

The instruction set out verbatim in this specification clearly imports that if the jury found for the plaintiff, they should take into consideration the elements which are stated therein, all of which are elements of future damages on account of permanent injury and incapacity and the manifest interpretation that any reasonable juror would place upon the instruction is that if he found for the plaintiff at all he should take all these elements into consideration, whereas the consideration of such elements would be of necessity wholly erroneous and irrelevant if the jury found, as they had a right to find, and could have found, that the plaintiff had suffered only temporary injury; and furthermore, this charge apparently assumes a case where there is total loss of earning capacity, whereas there was no evidence or proof thereof in this case. In fact the plaintiff admitted that he had worked and and that he was at the time of the trial able to do some kinds of work, and his complaint

(Tr. 3, Par. 5) simply alleges that his power to labor has been "diminished."

Even if this charge had been intended by the Court to be applied in case the jury found future damages, and had been qualified and restricted to that condition, it would still have been erroneous (1) because as shown in the argument under Specification IV above, there was no evidence of future damages reasonably certain to result from the injury complained of, no evidence that such damages would inevitably and necessarily result, although such proof is required, and there is no evidence other than that of experts to determine the effect in the future of a case of this kind. "Testimony of the condition up to the time of the trial with no evidence the condition would continue is not sufficient to justify the jury in considering future damages" (Shultz v. Griffith, 72 N. W. 445); (2) the instruction manifestly imports a case of future damages due to permanent injury, whereas permanent injury is not the only condition to justify future damages, since there may, in a proper case, be future damages, limited to cover a restricted damage, not due to any permanent injury.

While it is manifest that this erroneous instruction influenced the verdict, it is not necessary for the plaintiff in error to show that the erroneous instructions, or any erroneous instruction, influenced the jury. If the Court, in its instructions to the jury, erred with respect to some proposition of law, "it is well understood that the right of the defeated

party does not depend on his showing that the error actually influenced the verdict." (McDaniel v. McDaniel, supra).

Washington & G. R. R. v. Tobriner, 147 U. S. 571, 37 L. Ed. 284.

Strohm v. N. Y. L. E. & W., 96 N. Y. 304.

Main v. Grand Rapids G. H. & N. Y. R. R. (Mich) 174 N. W. 157.

Ayres v. Del. L. & W., 158 N. Y. 254.

Daigneau v. Grand Trunk R. R., 153 Fed. 593.

U. S. Cast Iron Pipe v. Eastham, 327 Fed. 185.

Specifications of Errors X and XI.

Each of these specifications are covered by the foregoing argument, and all thereof, which is directed to each of them, and it is submitted that these specifications are well taken. In reference to the excessiveness of the verdict of $7500, it is self evident that only proof of permanent injury and incapacity could have, under any circumstances, warranted such an amount and there was no evidence, to a reasonable certainty or at all, in law, there was no evidence of medical expenses incurred, of permanent injury or future damages due thereto; or of other expenses of this kind; the defendant in error testified that he had worked during part of the time before the trial and was able to do at least some kinds of work at that time.

There is no other explanation than that the jury acted upon the basis of conjecture and guess, that evidence does not sustain the verdict and the verdict was accordingly found under the influence of passion and prejudice. "Where the verdict is for a sum greatly disproportionate to the injury, that is, of itself, evidence that it was rendered under the influence of passion or prejudice." Estees, Pleading, Vol. III, Par. 4909.

The authorities cited below show much smaller verdicts for manifestly more serious injuries, and therefore show that the verdict in this case was exorbitant under the facts and circumstances, as they are and as proved by the evidence.

The Grecian Monarch, 32 Fed. 635.

The Iroquois, 113 Fed. 964.

Sheyer v. Lowell (Cal.), 66 Pac. 307.

Leeson v. Sawmill Phoenex (Wash.), 83 Pac. 891.

Klein v. Phelps Lumber Co. (Wash.), 135 Pac. 226.

Missouri Pacific Ry. Co. v. Tex. Pac. Ry. Co., 41 Fed. 311.

Hamburg American Co. v. Baker, 185 Fed. 60.

The Anchoria, 113 Fed. 982.

Louisville & N. R. Co. v. Subant, 96 Ky. 197; 27 S. W. 999; (Century Digest Vol. 15 Column 2114).

Wood v. Louisville and N. R. Co., 88 Fed. 44.

Engler v. W. U. Tel. Co., 69 Fed. 185.

Washington & G. R. Co. v. Tobriner, 147 U. S. 571, 37 L. Ed. 284.

Tweedy v. Inland Brewing Co., 134 Pac. 468.

Mason v. Lord, 40 N. Y., 476.

Putnam v. Hubbell, 42 N. Y. 106.

Mathews v. Coe, 49 N. Y. 60.

Snyder v. Great Northern, 152 Pac. 703.

In the Tweedy case: it is error for a court to find a fact, unsupported by evidence, or refuse to find a fact proved by uncontradicted evidence, and such a case is reversible.

In the Mathews case the court stated a finding of fact without evidence or wholly against undisputed evidence is an error in law.

CONCLUSION.

Various of the errors specified are so distinctive and different that the argument thereon is necessarily separate and somewhat unrelated to the other several specifications, except as all of them show the factors which support the claim of the plaintiff in error that substantial justice was not done in the trial and by the verdict and judgment and the Employer's Liability Law of Arizona under which the trial proceeded can fairly be stated to be still open to broad and uncertain interpretations, and it has

thus far been very meagerly passed upon except in restricted features by appellate courts. The five to four decision of the United States Supreme Court in the case of Arizona Copper Company v. Hammer, 63 L. Ed. 1058, suggests the uncertainty and possibility for different constructions of various features of the law. This Hammer decision also strongly intimates and suggests that the courts will be presumed and expected to see that the operation of said law is kept within the proper scope and especially with reference to excessive verdicts that are quite possible under an unlimited liability as created by the statute. By reason of the very fact that this law places unlimited liability upon an employer, an unusual condition among laws of the States, the courts must give a reasonable construction to the law to protect the employer in those features thereof which place limitations upon its operation. Under this view, therefore, the plaintiff in error earnestly presses its contention of error in the denial by the lower court of its motion for security for costs and of the denial of its demurrer and in lieu thereof the granting by the court to the defendant in error of the privilege of election to proceed under the Employer's Liability Law, said election being more than two years after the accrual of the action, and contrary to the Arizona laws providing that election of a remedy must be made by an employee within the said period of limitations. In several instances employees have brought actions, as in this case, alleging two inconsistent

causes and have been allowed by the rule of the courts to permit the complaint to stand until just before the time of trial and then to proceed upon whichever cause plaintiff chose. When a complaint, incorporating two such inconsistent causes, as in this case, is permitted to stand until after the two years has expired and then the plaintiff is permitted to make an election, the said limitation is thereby made ineffective and void and is decided to the manifest prejudice of the defendant. In this case the record shows that the plaintiff had been allowing his case to lie dormant; he had even failed to appear by counsel when the case was called August 4, 1919, but shortly before the trial and more than two years after the accident he secured new attorneys, who in fact, took the case up anew and were permitted to then make an election. The plaintiff in error had, at all times, for two years been ready and present at the term of court to proceed with the case, but the defendant in error was not so ready and present. The plaintiff in error had the right, under such circumstances, to infer that the defendant in error was not expecting to press his cause; and surely the plaintiff in error had the right to expect that no additional privilege would be given the defendant in error as a right after the two-year limitation had expired. It is submitted that the only reasonable and just conclusion, as well as the only lawful construction of the said laws of Arizona, is that an employee, having the liberal privileges which have been extended to him and having three

remedies to select from, must make his selection before the two-year limitation expires. This seems a very small requirement to ask of the employee in return for the manifest privilege the laws give him, and no practice or subterfuge should be encouraged or permitted which will allow the employee to, in effect, make void that provision of the law.

The specification based upon the offer of the X-Ray plates is prejudicial error, on account of which the Court should set aside the judgment. The right does not depend on showing that the error actually influenced the verdict, but the effect of this offer must have influenced the jury in arriving at its verdict, for the evidence in the case would not warrant the jury in returning a verdict of $7500.00. The rule is stated by the court in McDaniel v. McDaniel, supra, "a verdict should be set aside whenever the error or misconduct renders it reasonably doubtful whether a verdict has been legitimately procured."

The specifications with reference to erroneous admission of Mortality Tables as evidence and the expressed doubt of the judge thereon, of the instructions based thereon, and of the erreoneous instructions presuming permanency of injury, have been set out at some length and we trust with sufficient clearness and fullness to impart to the court the confidence we have that the errors were unquestionably prejudicial and reversible, and the admission of the American Mortality Tables based upon selected insurance risks and the instructions and

omissions to instruct thereon, all produced the effect that there was evidence of permanent injury and there was permanent injury. There is no conflict of evidence in regard to the injury. The only evidence thereof was that of the expert witness of the plaintiff below, who stated what he found as a result of his physical examination. There was no cross-examination of this witness. The evidence of the witnesses of the defendant below was based upon hypothetical questions and showed what would have been the result if said fracture mentioned by plaintiff's physician had been serious. The plaintiff's physician did not state any opinion whether he considered the condition serious or not and the result of the whole medical testimony, standing uncontradicted with reference to the injuries alleged in the complaint, is that the physical examination was made after two years and just before the trial, and showed there had been injuries to the scapula and fifth lumbar vertebra at some time, that some of these injuries consisted of fractures, that they had been repaired by nature and united, and that the said injuries must have been slight if they occurred at the time of the accident because if there had been serious fractures of the vertebra at least partial paralysis would have followed, whereas the testimony of the plaintiff himself showed that he did not, at any time, suffer from such paralysis, but worked shortly after the accident and his physician admitted (Tr. 46) the injury was not such as to necessarily cause paralysis. There was no testi-

mony offered that there would be any future consequences whatever. If there were to be future consequences, there should have been introduced some testimony as to how long they might last. If it is possible to say that there is evidence of permanent injury because an examination shows that there have been injuries or fractures to a scapula or to a vertebra that have been united and repaired by nature, then what kind of evidence could possibly be submitted in order to show that the injuries or fractures had been temporary injuries and had been repaired? If the aforesaid evidence of repaired and united fractures shows permanent injury, then every case where there have been fractures, which have united and been repaired, is irrevocably a case of permanent injury and there can be no such thing as a temporary injury where such fractures occur. Such is contrary to common sense and to the evidence in this case and is inconsistent even with the instruction of the court that the jury were to be the judges to what extent "as a result of said injury his spinal column has been impaired or his shoulder blade or shoulder has been injured and whether or not these incapacitations, if any, are permanent or merely temporary." Our confidence in our contention of the absence of evidence of permanency and the consequent errors in admission of Mortality Tables and of instructions upon permanency, is based upon the cases which have been cited; particular attention is drawn to the case of Snyder v. Great Northern Railway Company, 152

Pac. 703, as almost parallel in facts, but making this present case even stronger, as one where there is no evidence of permanent injury and one where it was reversible error to admit Mortality Tables.

The plaintiff walked into court and took the stand unaided, without any claim of deformity or of being crippled, or any evidence thereof. If a plaintiff in such a condition and upon the testimony in this case can obtain a verdict as for future and permanent injuries in the sum herein given, and such a verdict be allowed to stand, then the law in regard to the necessity of evidence to sustain a verdict is vain and of no effect, and the assumption of the Supreme Court in the Hammer case is not, it is submitted, being met by the courts in actual practice.

We submit therefore that errors prejudicial to the plaintiff in error occurred as hereinbefore specified, that the trial court erred to the prejudice of the plaintiff in error in the matters and things enumerated, that the verdict is for said reasons contrary to law, excessive, and deprives the plaintiff in error of property without due process of law, and said verdict and judgment should, in justice and right, be set aside and such other proper action taken by this Court as may seem meet.

Harrow & Cornick

Attorneys for Plaintiff in Error,
United Verde Extension Mining
Company, a Corporation.

APPENDIX.

EMPLOYER'S LIABILITY LAW.

Revised Statutes of Arizona, 1913.

Chapter Six, Title Fourteen.

Section 3153. This chapter is and shall be declared to be an employer's liability law as prescribed in section 7 of article XVIII of the state constitution.

Section 3154. That to protect the safety of employees in all hazardous occupations in mining, smelting, manufacturing, railroad, or street railway transportation, or any other industry, as provided in said section 7 of article XVIII of the state constitution, any employer, whether individual, association, or corporation, shall be liable for the death or injury, caused by any accident due to a condition or conditions of such occupation, of any employee in the service of such employer in such hazardous occupation, in all cases in which such death or injury of such employee shall not have been caused by the negligence of the employee killed or injured.

Section 3155. The labor and services of workmen at manual and mechanical labor, in the employment of any person, firm, association, company, or corporation, in the occupations enumerated in the next section hereof, are hereby declared and determined to be service in a hazardous occupation within the meaning of the terms of the preceding section.

By reason of the nature and conditions of, and the means used and provided for doing the work in, said occupations, such service is especially dangerous and hazardous to the workmen therein, because of risks and hazards which are inherent in such occupations and which are unavoidable by the workmen therein.

Section 3156. The occupations hereby declared

and determined to be hazardous within the meaning of this chapter are as follows:

* * * * * * * * *

(8) All work in or about quarries, open pits, open cuts, mines, ore reduction works and smelters.

* * * * * * * * *

Section 3157. Every employer, whether individual, firm, association, company or corporation, employing workmen in such occupation, of itself or through an agent, shall by rules, regulations or instructions, inform all employees in such occupations as to the duties and restrictions of their employment, to the end of protecting the safety of employees in such employment.

Section 3158. When in the course of work in any of the employments or occupations enumerated in the preceding section, personal injury or death by any accident arising out of and in the course of such labor, service and employment, and due to a condition or conditions of such occupation or employment, is caused to or suffered by any workman engaged therein, in all cases in which such injury or death of such employee shall not have been caused by the negligence of the employee killed or injured, then the employer of such employee shall be liable in damages to the employee injured, or in case death ensues, to the personal representative of the deceased for the benefit of the surviving widow or husband and children of such employee; and, if none, then to such employee's parents; and, if none, then to the next of kin dependent upon such employee, and, if none, then to his personal representative, for the benefit of the estate of the deceased.

Section 3159. In all actions hereafter brought against any such employer under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to any employee, or where such injuries have resulted in his death, the

question whether the employee may have been guilty of contributory negligence, or has assumed the risk, shall be a question of fact and shall at all times, regardless of the state of the evidence relating thereto, be left to the jury, as provided in section 5 of article XVIII of the state constitution; provided, however, that in all actions brought against any employer, under or by virtue of any of the provisions of this chapter to recover damages for personal injuries to an employee, or where such injuries have resulted in his death, the fact that the employee may have been guilty of contributory negligence shall not bar a recovery, but the damages shall be diminished by the jury in proportion to the amount of negligence attributable to such employee.

Section 3161. In all actions for damages brought under the provisions of this chapter, if the plaintiff be successful in obtaining judgment, and if the defendant appeals to a higher court, and if the plaintiff in the lower court be again successful; and the judgment of the lower court is sustained by the higher court or courts; then, and in that event the plaintiff shall have added to the amount of such judgment by such higher court or courts, interest at the rate of twelve per cent per annum on the amount of such judgment from the date of the filing of the suit in the first instance until the full amount of such judgment is paid.

Section 3162. No action shall be maintained under this chapter unless commenced within two years from the day the cause of action accrued.

Section 3176. * * * * * * *

Provided, if, after the accident, either the employer or the workman shall refuse to make or accept compensation under this chapter or to proceed under or rely upon the provisions hereof for relief, then the other may pursue his remedy or make his defense under other existing statutes, the State

Constitution, or the common law, except as herein provided, as his rights may at the time exist. Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.

No. 3580

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error.

vs.

MIKE KOSO,

Defendant in Error.

Brief of Defendant in Error

Upon Writ of Error to the United States District Court of the District of Arizona

---

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A. G. TAYLOR PRINTING CO., PHOENIX, ARIZ.

United States
Circuit Court of Appeals
for the Ninth Circuit

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error.

vs.

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Defendant in Error.

ADDITIONAL STATEMENT OF THE CASE

Answer was filed March 22, 1918, after which, on January 18, 1919, defendant filed its motion supported by affidavit for security for costs, which motion was submitted to the court February 6, 1919 (Tr. of Rec., p. 17), the same being overruled August 4, 1920, without an exception being saved to the action of the Court.

In the trial of the case, the evidence showed that the defendant in error had been knocked down by rock falling from the roof of the mine, which rock struck him on the back and shoulders injuring him to the extent of compelling him to lie where he fell for fifteen minutes or half an hour. (Tr. of Rec., p. 34.) Afterwards the cage came down and the shift boss came from the 1300 foot level and put the defendant in error in the cage and took him to the dry house, that "they" pulled off his clothes and put on clean ones, and tried

to wash his neck and back, which were full of rocks, and he was taken in an automobile to the hospital. (Tr. of Rec., p. 35.) That the back and right shoulder of defendant in error were hurt, also his left foot and toe, and that the rocks in falling hit the whole length of his back which he indicated. (Tr. of Rec., p. 35.)

That at the time of trial (more than two years after the injury) his back and shoulders were sore; that he could move his limbs around at that time, and was able to do easy work, but could not perform hard work; that after working ten or fifteen days his back started to hurt "bad"; that he could stoop over, but it hurt him; at the time of the injury he was earning $5.50 per day; that he had always done hard work and could not do office work or clerical work. (Tr. of Rec., p. 35.)

Shortly after receiving the injury "they" took him to the dry house; "they" put him on a bench in the dry house and then the dryman took off his clothes; that he could not lift his hand above his head (Tr. of Rec., p. 36), and it was ten days before he could put on his clothes without help. (Tr. of Rec., p. 37.) He remained in the hospital about twenty days and then the doctor told him to get out. (Tr. of Rec., p. 35.) After being told to get out of the hospital he went to Phoenix and at Phoenix he was under the treatment of Doctor Nichols, who wanted to put him in the hospital, "but I had no money." (Tr. of Rec., p. 37.)

The medical expert's testimony was substantially: That he carefully examined the defendant in error and the history of the case, together with an examination of the body by sight, hearing and touch, and also with the fluroscope, and:

> "In the first place he has an hernia, a beginning hernia in the right side. He has lost about 50 per cent of the power of his right hand and that the examination showed an injury to the scapula or shoulder blade, also there had been an injury to the fifth lumbar vertebrae on the right side that had been repaired by nature and a bony ridge thrown out connecting the fifth lumbar vertebrae with the first sacral vertebrae. The bone injury to the scapula has united and there is more bony tissue at present than there was before he was injured, and that the injury consists of fractures."

after which Mortality Tables were admitted and the defendant in error rested. (Tr. of Rel., pp. 38-39.)

ARGUMENT

SPECIFICATION OF ERROR I

Answering the several specifications urged by the plaintiff in error in their numerical order, defendant in error respectfully submits to the Court that Specification of Error One is improperly assigned for the reason:

First: That the error, if any, complained of, in overruling the Motion for Security for Costs, was not saved, as no exception was taken to the action of the Court.

Second: The Motion for Security for Costs was submitted on February 6, 1919, and taken under advisement by the Court, and the same was not acted upon or any action taken until the 4th day of August, 1920, more than four months after verdict and judgment in the case. The plaintiff in error, defendant below, having failed to secure a ruling on its Motion for Security for Costs until after judgment, cannot complain at this

time, as its failure to secure a ruling of the Court before trial constitutes a waiver of its rights, if any, under its motion.

Welch v. Hannie, 112 Miss. 79; 72 So. 861.

Third: The final ruling of the Court was correct as the affidavit submitted by the plaintiff in error in support of its motion was not sufficient in that the same was made on information and belief, and was wholly insufficient in that it failed to state any of the necessary facts required by the statute. An affidavit upon information and belief cannot supply the place of a positive allegation.

1 R. C. L., p. 772.
Dyer v. Flint, 21 Ill. 80; 74 Rm. Dec. 73.
Archer v. Claffin, 31 Ill. 361.
Rollins v. Carroll, 81 Ill. 227.
Bassett v. Bratton, 86 Ill. 158.

The failure of the plaintiff in error to have the court pass on its motion for security for costs before judgment, constitutes a waiver of the motion and all its rights thereunder; its failure to save an exception to the action of the Court when taken leaves it in a position where it cannot, in this Court, assert or predicate any error upon the rulings of the Court. Moreover, its affidavit submitted being insufficient, the action of the Court was right and no error committed in its ruling.

SPECIFICATION OF ERROR II

This error is improperly assigned, the complaint consists of two counts. To this complaint demurrers were interposed:

First: To the complaint in its entirety.

Second: Separately to the first count; and

Third: Separately to the second count.

Plaintiff in error complains that the Court erred in overruling *or failing to act* upon the demurrer interposed by the defendant in error to the whole complaint. The Court did not overrule the demurrer to the complaint, certainly the plaintiff in error cannot complain of the *failure to act upon the demurer*, having proceeded to trial without obtaining a determination of a demurrer or motion is a waiver of such demurrer or motion, except only that the complaint or declaration des not state facts constituting a cause of action, and the latter is not asserted; moreover, it appears that the plaintiff in error obtained leave to file an amended answer, which, however, was not filed, but instead thereof proceeded to trial.

In argument in this Court the Statute of Limitations is sought to be invoked, but wherein does, in the record, such claim or assertion appear to have been made in the Court below? Or, what adverse ruling of the Court below is drawn in question, of which plaintiff in error can here complain? It is not improper to remark, as passing comment, that the procedure here adopted, of stating the cause of action in two counts, was not new and novel; counsel for plaintiffs in this class of actions being uncertain as to the ultimate determination of the constitutionality of the Arizona Employer's Liability Act did uniformly state such causes of action in two counts.

Arizona Eastern Railroad Co. v. Bryan, 18 Ariz. 106.

SPECIFICATION OF ERROR III

Here again we ask what adverse ruling of the

Court below is drawn in question by this Assignment of Error? Counsel for defendant in error offered certain X-Ray photographs; perhaps they were not sufficiently identified to permit their introduction; counsel for plaintiff in error objected thereto and the Court sustained the objection. If this be error, then, indeed, most all cases wherein improper evidence was offered, and though rejected, be reversed.

The plaintiff in error had the opportunity to request from the trial Court an admonition to the jury, which it failed to request. Again, it had the opportunity to present such error or impropriety of counsel for the defendant in error to the trial Court for correction in its motion for a new trial; it failed to do so. Can the plaintiff in error here, for the first time on appeal, assign error of conduct, the propriety of which was not even mooted in the Court below?

SPECIFICATION OF ERROR IV

Under this head the plaintiff in error complains of the introduction of the American Mortality Tables into evidence.

It must be conceded that in general, the introduction into evidence of these Tables is no longer questioned.

> Wigmore on Evidence, Vol. 3, Sec. 1698, page 2178.

The plaintiff in error, as we understand his brief, raises two objections upon which he predicates supposed error:

First: That there was no sufficient evidence in the record to show that the defendant in error was within

the "class" to which the particular tables were applicable, and,

Second: That there was no evidence of permanent injury to the defendant in error.

Neither of these objections were raised in the trial Court. The objection raised in the trial Court was that the Tables do not apply to those engaged in mining occupations.

But, as to the merit of these objections, the first, upon analysis we find is based upon the hypothesis that as a condition precedent to the introduction of the Tables a party must show, affirmatively, his previous habits. We take it that the plaintiff in error means by this that defendant in error in the instant case, must have shown affirmatively that he was a man of good moral habits; yet, we venture the assertion, had defendant in error gone so far as to have attempted to make such a showing, the plintiff in error, in indignation would have arisen to protest against the admissibility of such irrelevant and immaterial matter,—and quite properly so. We have found, from a perusal of the cases cited by the plaintiff in error in his brief, that the word "habit" or "habits" has been used in two or three instances, but we assert that such words, when used in the cases cited, were used in the sense of depicting a phase of physical hardihood, and were in no sense intended to be understood as opening up the avenue of "moral standing." We can not appreciate and frankly do not understand the position of the plaintiff in error, with reference to this part of his contention, less the same results from a confusion of ideas. It were a hard rule, indeed, which would require, as a condition precedent to the introduction of mortality tables, that the

party seeking such introduction would have to show that he was a man of good moral habits—and such a contention, indeed, finds support neither in logic nor at law.

It may be said, wth some degree of force and logic, that the prior good health of the party seeking the introduction of the tables must be shown, but we do not concede that this showing must be detailed over any given period of time in the past. We assert, on the contrary, that when the party seeking to introduce the tables, has testified that before the injury he was a man in good health, and where, as in this case, that evidence stands uncontradicted on the record, that there is a resultant presumption of fact which aids the bare "dogmatic" statement.

The defendant in error, testifying on direct examination during the progress of the trial, stated:

> "I have been a sailor, and in mining the last 18 years. (Tr. of Rec., p. 34.)
>
> "Before this accident I was feeling good, and had nothing on my back and shoulders." (Tr. of Rec., p. 35.)

We believe the above testimony to have been a sufficient predicate for the introduction of the tables upon the specific objection taken under the first point raised.

As to the second point, we concede that before mortality tables may be used in evidence, that there must be some evidence, something beyond mere fragmentary evidence, of the permanent nature of the injury.

We submit that the evidence adduced at the trial of this cause in the Court below, having particular rela-

tion to the injury of the defendant in error tended to show a permanent injury.

Dr. Wyn Wylie, testifying on behalf of the defendant in error, stated:

> "In the first place, he has an hernia, a beginning hernia on the right side. Hernia is another name for rupture. He has lost about 50 per cent of the power of his right hand. There has been an injury to the scapula or shoulder-blade, and there has been an injury to the fifth lumbar vertebrae on the right side, that has been repaired by nature, and a bony ridge thrown out connecting the fifth lumbar vertebrae with the first sacral vertebrae. The injury to the scapula, the bone injury, has united and there is more bony tissue there at the present than there was before he was injured. This injury consisted of fractures." (Tr. of Rec., pp. 38-39.)

This testimony was affirmative and positive in its nature. When we say that a man has lost fifty per cent of the power of his right hand, we must surely mean that fifty per cent of the power of that right hand is gone forever,—lost beyond recovery.

It has been repeatedly held by the Courts that, where permanency of injury is controverted, the mortality tables may be admitted to be considered by the jury in case they find that the injury is permanent.

> Richmond, etc., R. R. Co. v. Garner, 91 Ga. 27: 16 S. E. 110.
>
> Blair v. Madison County, 81 Iowa 313; 46 N. W. 1093.
>
> Wilkins v. Flint, 128 Mich. 262; 87 N. W. 195.

As questions relating to instructions given with re-

spect to these mortality tables are taken up at a later time, in the brief of plaintiff in error (Specifications of Errors VI, VII and VIII), we leave the argument of the above objections, believing, as we do that all possible safeguards were thrown about the submission of the question of the probative force of the mortality tables in the instruction of the court upon the subject.

SPECIFICATION OF ERROR V

We concede that where a recovery is sought under the provisions of the Employer's Liability Act of the State of Arizona, that the plaintiff must show that the accident was not caused by his own negligence. But in this connection we assert that it is supercilious to contend that proof of such a "negative pregnant" can be made by any other means than to show the conditions, facts and circumstances surrounding the accident. At the close of the plaintiff's case, the plaintiff in error (defendant) did not move for a directed verdict. It then must have deemed the plaintiff's proof sufficing. Surely, the defense, at most, only created a conflict. But, we submit further that, in this particular case it apepars with reasonable certainty that it was not the negligence of the defendant in error which caused the accident. The accident was one commonly known as a cave-in, the defendant in error testified that he was at work shoveling muck into a mine car, and while he was bending to get a shovel full of debris or muck from the floor of the tunnel at the particular point at which he was working, he was injured by rock falling from the roof of the tunnel without warning. The defendant in error further testified that he was directed to work at this particular point by the foreman in charge (Tr. of

Rec., p. 34), and that at the place where he was working it was soft ground and not timbered.

What more could have been required, and where is counsel for plaintiff in error leading us? Surely no clearer case could be made under the Employer's Liability Act, and most assuredly no firmer proof of freedom from negligence on the part of the defendant in error could have been made. Only could the Court have directed a verdict by arbitrarily assuming that the defenadnt in error was guilty of negligence in working at the place where he was directed to work.

We submit it would be incomprehensible that, before an employee can recover under the terms of the Employer's Liability Act, he must show freedom from negligence in any larger sense than was shown in the trial of this cause. Besides, the question of whether or not the negligence of the defendant in error caused the accident, was a question of fact to be submitted to the jury under proper instructions of the Court, and the finding of the jury in that respect is conclusive. The instruction given by the trial Court in this behalf was clear, explicit, sound and most advantageous to the plaintiff in error. (Tr. of Rec., p. 49 top.)

It must be borne in mind that assumption of risk and contributory negligence are, by the substantive law of the State of Arizona, in all cases whatsoever, questions of fact for the jury.

Section 5, Article 18, Arizona Constitution.

SPECIFICATIONS OF ERROR VI, VII AND VIII

These specifications question the soundness of the trial Court's charge to the jury with reference to the Mortality Tables. The exception taken to the charge

is specific and did not direct the trial Court's attention to error, if any, now urged; therefore, even if the argument be of merit it was not a proper assignment of error under Rule 10 and could not be the basis of specifications of error in this Court. The exception is as follows:

> "MR. CORNICK—We desire to note an exception to *one* part of Your Honor's charge, and to make two requests. We desire to note an exception to that part of Your Honor's instructions with regard to the Mortality Tables as evidence in this case, *because we believe that under Your Honor's charge the instruction presumes the permanency of the injury.*" (Tr. of Rec., p. 56.)

Therefore, the sole inquiry here should be limited as to whether or not this exception was well taken and whether or not the charge assumed "permanency of injury."

Counsel say:

> "The whole tendency of the instructions of the Court, taken as a whole, and particularly with reference to mortality tables, showed an assumption that there was evidence of permanent injury." (Brief, p. 36.)

Counsel for plaintiff in eror have wronged the trial Court; we cannot conceive how the trial Court could have more jealously safeguarded the rights of the plaintiff in error.

> THE COURT—"Well, if you or any one else so understood me, I desire to correct it now, because I didn't assume, and I don't assume, that the plaintiff has been permanently injured or injured at all, that is a question for the jury."

MR. CORNICK—"Then we desire further, Your Honor, to note an exception—"

THE COURT—"Pardon me, but I do say that if the jury does come to the conclusion that the injuries are permanent, then they may consider the Mortality Tables, if they come to the conclusion that the injuries are temporary and not permanent, then the Mortality Tables, as to his erpectancy of life, should not be considered at all. Any further erceptions?" (Tr. of Rec., pp. 56-57.)

That the Court had assumed permanency of injury was not anywhere intimated by counsel for plaintiff in error either during the progress of the trial, or during the taking of the plaintiff in error's exceptions to the charge of the Court.

Indeed, the Court below did not assume in the charge or in the introduction of the tables that the plaintiff was permanently injured. In the charge, the Court commenting upon the measure of damages stated to the jury that such Mortality Tables were evidence:

"*If* the injury is of a permanent character—"

and thereafter also followed the specific directions quoted at length.

In the objection to the introduction of the Mortality Tables, certainly no objection of an assumption by the Court of permanency of injury does appear (Tr. of Rec., pp. 39-40), the only objection thereto urged being that they were not admissible because the plaintiff was shown to have been engaged in a hazardous occupation and that, therefore, the plaintiff would not fall within the law of averages. In this the trial Court certainly protected the plaintiff in error, for the jury were told that the fact that the defendant in error had been en-

gaged in a hazardous occupation was a circumstance to be by the jury taken into consideration as tending to show that the expectancy of life was less than the tables would indicate.

How could the trial Court have been fairer to the plaintiff in error?

Certainly it cannot be contended that there was no evidence tending to show permanency of injury. Plaintiff in error, in objecting to the introduction of the Mortality Tables (Tr. of Rec., p. 39), was specific and did not in the least question the admissibility of the tables because no evidence had been introduced tending to show permanency of injury, but was limited to the objection that they do not apply where the person injured was engaged in a hazardous occupation. If any one assumed permanency of injury of the defendant in error it was not the trial Court in its charge to the jury, or in the admission of these tables, but it was counsel for plaintiff in error who, by specifically objecting to the introduction of the tables and not objecting on the grounds that there was no evidence tending to show a permanency of injury, must necessarily then have assumed that such evidence was present in the record.

Finally, it appears that this assignment of error was made a basis for the motion for new trial. The Bill of Exceptions does not indicate an exception to the action of the trial Court denying the motion for new trial. True, the Minute Entries overruling the motion for new trial states that an exception was taken by the plaintiff in error to the overruling of the motion for new trial but the plaintiff in error did not see fit to include such error, if any, in the Bill of Exceptions signed by the Judge.

SPECIFICATION OF ERROR IX

Hereunder the plaintiff in error seeks to question the correctness of the instruction given by the trial Court upon the question of damages. No exceptions thereto were taken, and hence, even if of merit, cannot be the basis of an assignment or specification of error in this Court.

SPECIFICATIONS OF ERROR X AND XI

Plaintiff in error, under this specification complains of what he terms the excessiveness of the verdict rendered by the jury and bases his contention upon the dogmatic statement that there was no evidence tending to prove or proving injury of a permanent character. The record is a complete refutation of such an argument. (Tr. of Rec., pp. 34-37 and pp. 37-39.)

Here, a man who had been a sailor and miner for the past 18 years of his life, occupations demanding great physical endurance and agility, testified that he could not now engage in the avocations which he had followed in the past 18 years, and could not perform or do hard manual labor of any kind. This statement on the part of the defendant in error is corroborated by Dr. Wyn Wylie's testimony given in the court below. During the course of this brief we have had occasion to refer to that testimony. Dr. Wylie stated positively that fifty per cent of the power of the right arm of defendant in error was lost. Will it be presumed that a man can follow the occupation of mining or that of a sailor after the destruction of fifty per cent of the power of his right arm? Or is it not more reasonable to deduce from this fact that the defendant in error was

permanently injured and hence that the earning power of the defendant in error was very materially and permanently decreased?

But if this were not enough to support the verdict rendered, then we suggest to the Court that the defendant in error suffered other serious injuries of a permanent nature. It was shown at the trial that the defendant in error sustained an injury to the scapula or shoulder blade, a fracture; and that the defendant in error also sustained an injury to the fifth lumbar vertabrae on the right side. (Tr. of Rec., p. 39 top.)

The above testimony taken in connection with the statement of the defendant in error that he was unable to do hard work, and that it hurt him to stoop over, should, in our opinion, form a sufficient predicate upon which the jury might well have concluded that the defendant in error was in fact seriously and permanently injured in his person.

The plaintiff in error has cited some seventeen cases to demonstrate that juries have, under the particular facts of these individual cases, allowed a much smaller amount for a similar or greater injuries than the defendant in error sustained. The adjudicated cases upon the subject of inadequate and excessive damages are innumerable. It would seem to us to be idle waste of time to confront this Court with the citation of cases holding under given state of facts that a certain sum was inadequate or was excessive, since it occurs to us that whether or not damages in any particular case are excessive or inadequate is dependent upon the particular facts of that case.

We conclude, therefore, with the statement that both the Court and the jury have passed upon the dam-

ages in this cause, and seemingly neither concluded that the amount awarded was excessive. No exception was taken to the refusal of the trial Court to grant a new trial.

In conclusion, we respectfully submit that the judgment of the lower Court should, in all things, be confirmed.

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Attorneys for the Defendant in Error.

No. 3580

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error,

vs.

MIKE KOSO,

Defendant in Error.

ABSTRACT OF CASES CITED IN BRIEF OF PLAINTIFF IN ERROR

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Attorneys for Plaintiff in Error.

Filed this.....day of....., 1921.

.....
Clerk U. S. Circuit Court of Appeals.

Service of copy acknowledged this..... day of....., 1921.

.....
Attorneys for Defendant in Error.

Courier—Prescott

TABLE OF CASES CITED IN BRIEF AND INCLUDED IN THIS ABSTRACT

No. 3580

UNITED STATES CIRCUIT COURT OF APPEALS

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UNITED VERDE EXTENSION MINING COMPANY, a Corporation,
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vs.

MIKE KOSO,
Plaintiff in Error,

ABSTRACT OF CASES CITED IN BRIEF OF PLAINTIFF IN ERROR

The following abstracts are given of cases cited, except several cases commented upon in the printed brief, and a few additional cases at the end hereof showing requirement that evidence must indicate to a reasonable certainty that an injury is permanent. Some notations occur, and from some cases simply short quotations or statements of law are given. This abstract is submitted as a supplement to the brief, as an endeavor to aid the court and counsel the more readily to grasp the points and arguments of the plaintiff in error, and the law in support thereof.

Consolidated Arizona Smelting Co. v. Ujack, 15 Ariz. 382:

The court at page 388 states: "The last sentence of section 14 (Sec. 3176, R. S. A., 1913) reads:

'Any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively.' This seems to us a plain declaration by the legislature that the employee is at liberty to pursue any of the remedies provided by law until he adopts one by instituting a suit for redress, when the one adopted becomes exclusive."

Kerrigan v. Pennsylvania Railroad Co., (Pa.) 44 A. 1069:

The plaintiff was a brakeman and had an arm crushed. A volume containing Carlisle Tables was offered to show expectancy of life, was objected to and the objection overruled. The Appellate Court states that the offer was general and pointed to no particular life table applicable to the special facts of the case; it did not suggest whose lives, what class, or what the perils of the employment were; the objection was general and the lower court inadvertently admitted the tables and fell into error because it had no aid from either side. Carlisle Tables have been admitted in cases to determine expectancy of life because they are based on general population and not on selected risks, and their value depends greatly upon similarity of the life in question to conditions and habits one hundred years ago. The Court states that C. J. Paxson in the Steinbrunner case expressed the fear these tables would prove dangerous unless the attention of juries was pointedly called to other matters affecting the expectancy.

In this case the habits and health were not proven and under the meager facts, expectancy as fixed

by the tables can have but little weight. No doubt tables made up by reputable insurance companies furnish a fair expectancy on selected lives on which they are based. There was scarcely any proof of facts which brought the plaintiff within the class of selected lives. The court below stated life expectancy was estimated at approximately forty years and the jury could take that as a means of estimation; the fair inference was that the tables established this. Such tables are not entitled to that weight unless by proving the plaintiff had brought himself within the selected lives.

The court called attention to the care that ought to be exercised in dealing with this kind of evidence in any particular case and states that experience has demonstrated Justice Paxson's fear. Courts and juries are apt to supply the place of proof of the particular life by generalization from life tables. This is going further than is intended or warranted. The case was reversed.

Rooney v. N. Y. N. H. & H. R., 53 N. E. 435:

These tables (annuity) are usually computed on the probabilities for sound lives, while in cases on trial many circumstances make different probabilities. In estimating damages for personal injury the amount to be allowed for loss of ability to earn depends on conditions which vary. The physical condition of plaintiff would very likely have changed from other causes if there had been no accident; income from any calling is not constant; ability to get employment is likely to change. For these and other reasons, annuity tables will seldom

be found helpful; and if used, the jury should be carefully instructed to apply them only so far as the facts found correspond to those on which the tables are computed.

Steinbrunner v. Pittsburg Railway Co. (Pa.), 28 Am. St. Rep. 806, at page 810:

The value of mortality tables will depend very much on health, habits, social surroundings, and other circumstances and attention of juires should be pointedly called to those qualifying circumstances.

Ward v. Dampskibsselskabet, 144 Fed. 524. At page 526, it is stated:

But the restriction under which such testimony should be received and the cautions with which it should be submitted to the jury are clearly and authoritatively set forth in Kerrigan v. Pa. R. R.

City of Friend v. Ingersoll (Neb.), 58 N. W. 281:

Sidewalk fall; hip broken, cancer, etc. Carlisle tables offered. This table admitted in cases of death or where injury is shown to be permanent. The admissibility of the table should, it seems to us, depend—to some if not to a great extent—upon what facts enter into it. If based upon selected or healthy lives alone it cannot be introduced in any case except where the same kind of life is involved. If based on general average of lives, it is competent in any proper case in which expectancy is an element, not as conclusive. Age and habits are among important matters for consideration.

It appears Carlisle tables are based on general population, and not on selected or insurable lives.

Kahn v. Herold, 147 Fed. 575.

At page 582, the Court states: "Life tables at the best are uncertain and conjectural evidence. They are used because in many cases they afford the best, if not the only means of ascertaining the probable duration of life." It is unnecessary to decide the question whether their use is unwarranted.

Grier v. Louisville R. R. Co. (Ky.), 42 Am. St. Rep. 345:

In this case evidence from Mortality Tables showing the expectancy was read. The court quotes an authority to the effect that such evidence is competent where the injuries are permanent, but the court states that such evidence must be taken subject to conditions surrounding the particular individual and in connection with the fact that the mere probable continuance of life is shown and not the duration of ability to work. At page 350, the Court states:

> "On the whole it would seem better if the jury are to find for the plaintiff in a given case that they should be instructed in estimating the amount of the damages to take into consideration the age and situation of the plaintiff, his earning capacity and its probable duration, his bodily suffering, and mental anguish resulting from the injury received, and the loss sustained by the want of the limb injured and the extent to which he

is disabled from making a support for himself by reason of the injury received."

Corpus Juris, Vol. 17, pg. 875, Note 84a:

The jury must be instructed that the value of Mortality Tables when applied to a particular case will depend upon other matters such as the state of health, habits and social surroundings.

Pauza v. Lehigh Valley Coal Co. (Pa.), 80 A. 1126:

It is the duty of the judge to carefully guard the effect to be given (table) by the jury. Unless this is done in a very pointed and direct way by the court, the jury may be misled as to value and weight to be attached to this character of evidence. The important fact for the jury to determine is the life expectancy of the injured party. This depends more on his prior state of health, character, habits, perils of employment, personal characteristics and other circumstances surrounding his own life than it does upon the average expectancy of other lives. The trial judge should instruct that these tables are not to be accepted as establishing the expectancy but only as an aid. It is not sufficient to instruct the jury that the tables are some aid, but not conclusive in determining the life expectancy of the injured party. All the circumstances affecting the probable duration of life disclosed by the evidence should be called to the attention of the jury in order that they may have an intelligent understanding of what their duty is in determining the life expectancy in the particular case.

MacGregor v. R. I. Co., 60 At. 761:

The plaintiff suffered by jolt and shock and alleged "For a long time to come he would continue to suffer pain and nervous shock, and will be unable to earn any wages." The court states that in some injuries the permanency is obvious while in others it is a mere probability, and a careful consideration of the medical testimony shows no evidence of permanency "since no one of them testified that their permanency is even probable" but simply that the injuries may last indefinitely.

To entitle plaintiff to recover present damages for apprehended future consequences, there must be such degree of probability of their occurring as amounts to a reasonable certainty they will result from the original injury.

Such being the state of the evidence the court said it failed to see the relevancy of mortality tables; that such tables may be proper where there is death, or permanent injury is inevitable, or with reasonable probability must result, but where such injury is not shown to be probable, not to say that it is not proven, the admission is improper.

While it is not possible to determine accurately upon what testimony the jury based its verdict, if the amount is based on permanent injury for a period established by life tables, the evidence does not warrant such finding. The case was reversed.

Filer v. N. Y. C. R. R., 49 N. Y. 43:

Compensation for past and prospective damages. Limit respecting future damages is that they must

be such as it is reasonably certain will inevitably and necessarily result from the injury. At page 46 the Court says:

> "There is no evidence other than that of experts by which courts and juries can determine whether a disease or an injury has been, or can be permanently cured, or what its effect will be upon the health and capability of the injured person in the future." Hypothetical question to expert held competent.

Tweedy v. Inland Brewing Company, 134 Pac. 468:

There was a collision between a bicycle and a truck, and a verdict for $4000.00, from which appeal was made on the ground that it was excessive. The court stated at page 469:

> "Having read the testimony and being fully conscious of the weight to be given the verdict, we believe this contention must be sustained.
>
> "The injuries to the plaintiff as testified to by a physician who attended him was 'excessive soreness throughout the cervical region' extending down between the shoulders to the third and fourth dorsal vertebra. The accident was in June and the trial was in November; the plaintiff testified he was unable to follow his trade of carpenter (admitted having worked four and one-half days and at other times). Another physician testified to a condition 'we do not understand', that is a liquid deposit in and around the spinal column and a superabundance of lub-

> ricating fluid on his spinal cord, with more or less what we call solid matter, and it remains, does not absorb . . . . . the present condition of respondent will become permanent."

Another physician testified that continued treatment would overcome the condition. The court states it appears to us from the evidence before us the jury was not justified in assessing damages on any theory of permanent injury, and that the verdict should have been for such a sum as would compensate the plaintiff for the pain and suffering endured and for an injury of a temporary nature. Such a sum should not exceed $1500.

(If the court in the above case after testimony of a physician giving the specific opinion of permanency of an injury to the spine, could decide there was nothing to justify the theory of permanent injury, and accordingly modify the verdict, what possible support is there for a theory of the permanency of the injury in the present case).

Mott v. Det. G. H. & M. R. Co., 79 N. W. 3:

Plaintiff bruised, shoulder was partly dislocated. Verdict for $2000, reversed. Plaintiff was allowed to introduce the mortality tables which showed plaintiff's expectancy of life was forty years. These tables are only admissible in a case of permanent injury, or where suit is brought by representatives of the deceased. Plaintiff offered no testimony to show permanent injury. All the physicians found no evidence of any, and he himself on trial said he

was not as bad as he used to be. The court said this testimony should have been excluded.

W. U. Tel. Co. v. Morris, 83 Fed. 992, (C. C. A. 8th Circuit):

At page 995 the Court says: "In some cases injuries are sustained which are of such a nature as will, in themselves, warrant an inference that they will permanently affect the injured person's health or lessen his capacity to labor; but in the present case we cannot say that the injuries inflicted by surgical operation were of such a character that the jury were at liberty to infer therefrom that the health of plaintiff would be permanently affected or his capacity to labor thereby impaired." Reversal of judgment.

(Note: Operation referred to was removal of ovaries, etc. It is a well established rule in cases of this character that where damages are claimed for a permanent impairment of health there must be some evidence before the jury tending to show such damage, otherwise an instruction "to consider the probability of a permanent impairment" is erroneous and sufficient cause for reversal).

Sax. v. Det. G. H. & M. Co., 84 N. W. 314:

Brakeman's hand injured; idle four months; reemployed and discharged. Sued for breach. Mortality tables admitted to show expectancy. In Texas it is held that the disability must be not only permanent, but total to admit. Tables admissible wherever expectancy of life comes in controversy. In this case there were other elements to be con-

sidered. His probable infirmity was also an important factor. The tables should have been excluded.

Leach v. Detroit Co., 84 N. W. 316:

Mortality tables were introduced and claimed to have been erroneously admitted because it was not shown the injuries were permanent. Plaintiff contends the testimony shows they were permanent and relies on testimony of Dr. K, but we think under any fair interpretation of his testimony it falls short of showing permanent character, while the testimony of Dr. D shows a trifling injury. Court cites the Mott and Sax cases holding mortality tables were inadmissible. Judgment was reversed.

Tenney v. Rapid City, 96 N. W. 96:

Sidewalk injury; judgment reversed; plaintiff offered N. W. Life Tables. Defendant objected as irrelevant, immaterial, and no proof of permanency. Overruled. The admission of these tables was clearly erroneous and constituted prejudicial error. No evidence is disclosed that plaintiff was permanently injured or might not recover from injuries. The court said the admission therefore constituted reversible error.

Foster v. Village of Bellaire, 86 N. W. 383:

The testimony offered on the part of the plaintiff tended to show that she was seriously injured, but it did not show she might not recover.

Against objection, tables were admitted. For

this error judgment reversed. (7 Encyc. of Evidence 426 also supports this).

Hardy v. Milwaukee, St. L. Ry. Co., 89 Wis. 183, 61 N. W. 771:

The rule is that the alleged permanent disability in order to be a ground for damages must be one that is reasonably certain to result from the injury complained of.

The charge of the lower court allowed the jury to assess damages for pain etc., which plaintiff "may endure hereafter." The higher court states that the rule is that the alleged permanent disability, in order to be ground for damages, must be one that is reasonably certain to result from the injury complained of. We think that the charge was too broad and allowed the jury to go into a field of mere probability instead of being confined to the field of reasonable certainty. The judgment was reversed.

St. L. & S. F. R. v. Nelson, 49 S. W. 710:

Loss of arm in railway accident. Where the injury has not resulted in death or total disability, such evidence (tables) should not be admitted, as it would tend only to confuse the jury upon the measure of damage.

Tex. Mex. Ry. Co. v. Douglas, 7 S. W. 77:

Permanent injury to hand. Judgment reversed. The rule seems to be that when death results from an injury, or when the evidence tends to show that

the earning capacity of the party is entirely destroyed, the testimony is admissible (Iowa cases). We think where the disability is shown to be only partial, such evidence would tend to confuse the jury.

City of Honey Grove v. Lamaster, 50 S. W. 1053:

Hand injured by electric wire; court says rule in Douglas case applies, that life expectancy is not legitimate evidence where impairment is not shown to be permanent. Reversed.

Remsnider v. Union Savings & Trust Co., 154 Pac. 135:

A janitor was crushed by an elevator and was awarded $5000.00 damages. The only contested fact was the character and extent of his injuries. On appeal the contention was there was an excessive verdict. The evidence showed the injury was mainly to the sciatic nerve, resulting in partial paralysis of the right leg and foot, also hernia and injury to the kidneys, causing blood passage. All of these conditions persisted at the time of the trial, nine months after the injury; five doctors testified; two said he was malingering and the injury was not permanent; three were of the opinion the suffering was real, and two of these latter were positive that there was permanent injury, while one was doubtful whether there would be complete restoration. Upon this conflict of testimony, the question of permanency was said by the court to be for the jury.

(This case shows the kind and positiveness of

conflicting testimony which is required before a conflict of evidence as to permanency is warranted for submission to the jury).

City of Shawnee v. Slankard, 116 Pac. 803:

Evidence showed serious character of injuries; physician testified they were such as would indicate a permanent weakness, and the injured shoulder would not be likely to ever recover strength. Tables are evidence where proof shows earning capacity is destroyed and the injury will probably be permanent, as shown in the case. Because of these things, the lower court did not err in permitting introduction of tables.

Thayer v. Denver & R. G. R. Co. 154 Pac. 691:

An engine and car collided and the plaintiff was thrown from the top of the car; his leg was broken, his face cut and bruised, his teeth knocked loose, his jaw affected, and his hearing injured. He testified at the trial that he still suffered pain at the point of break, that his hearing was gradually growing worse, and that he was not able to chew on the side of his jaw that was injured.

The lower court, over objection, permitted the American Mortality Tables to be admitted. The appellant claimed error in admission on the ground "that there was no proof that appellant's injuries were permanent." At page 702, the Court states:

> "As to whether the evidence established the fact that the injuries were permanent need not be considered, as such fact may be established upon the subsequent trial, if it

> was not so established in the former trial * * * The rule only need be stated, that in order to justify the admission of evidence of life expectancy, the evidence must establish the fact that the injury was permanent. And it is not sufficient that the evidence shows that the injury was serious. But the mere fact that the evidence as to the permanency of such disability is conflicting will not necessitate the exclusion of the evidence."
>
> "If there is substantial evidence tending to show that the injuries are permanent, such tables are properly received in evidence."

This case was reversed.

(It will be noted that the injuries in the above case were, according to the evidence, more serious than in the case in question, yet the court throws doubt upon the extent and states that the evidence must establish permanent injury).

Snyder v. Great Northern Ry. Co., (Wash.), 152 Pac. 703:

An engineer jumped from the locomotive when it was derailed, and was seriously injured. At page 706 (4) the Court states:

> "In the course of the trial the court permitted the introduction of mortality tables to show the expectancy of life of the plaintiff. It is argued by the defendant that this was error, because it was not shown that the plaintiff was permanently injured. We think this position must be sustained. The most the evidence showed was that the plaintiff developed a neurasthenic condition after his

injuries. He testified that since his injuries he has been required to walk with a cane, and with a limp or dragging of the foot. But we think there was no evidence of the fact that this dragging of the foot or limping was the result of the injuries which he received at the time of the accident. None of the doctors testified, so far as the record shows, that the natural and reasonably probable result of the injuries which the plaintiff received at the time of the accident would be a permanent injury. The court therefore erred in receiving these mortality tables in evidence."

There was a verdict for $9500.00, which was remitted $3000.00 under the order of the lower court but the defendant appealed from the reduced judgment and the judgment was reversed by the Supreme Court.

Pollock v. Pollock, 71 N. Y. 140:

This case holds that it is an error of law to find a material fact when there was a total absence of evidence to sustain it; that when it is said there is no evidence to go to a jury, it is not meant there is literally none but that there is none which ought to reasonably satisfy a jury; that insufficient evidence is, in the eye of the law, no evidence.

The Warren Adams, 74 Fed. 413:

When goods are damaged while in the possesion of a carrier, there is prima facie presumption that the injury is occasioned by the carriers default, and the burden is upon him to prove that the dam-

age arose from a cause for which he is not responsible.

Hudson River L. Co. v. Wheeler Co., 93 Fed. 374:

The fact that an article was shipped in good order and was found damaged on delivery is presumptive evidence of negligence on the part of the carrier, and casts upon it the burden of proof in what manner the breakage occurred.

C. & A. Co. v. Chambers, 20 Ariz. 54:

The plaintiff, in order to recover under the Employer's Liability Law is required to allege in his complaint and sustain by evidence that he was employed by the defendant in an occupation declared hazardous and while engaged in the performance of the duties required of him was injured and the injury was caused by an accident due to a condition or conditions of such employment, and was not caused by the negligence of the plaintiff.

St. Louis Cordage Co. v. Miller, 126 Fed. 495; (C. C. A. 8th Circuit):

At page 508 the Court states: "A preliminary question for the judge always arises at the close of the evidence, and before a case can be submitted to the jury. That question is not whether or not there is any evidence, but whether or not there is any substantial evidence upon which a jury can properly render a verdict" (Supported by many Federal authorities).

Vicksburg & Meridian R. R. Co. v. Putnam, 30 L. Ed. 257; 118 U. S. 545:

Limiting the jury to mortality tables and nowhere suggesting that they are at liberty to arrive at a result independently thereof, is erroneous.

Where the court judges as to the use of annuity tables it is its duty to fully instruct the jury concerning the use of and weight which should be given, and it should in a case where the evidence, whether the injury is permanent or temporary, is conflicting, instruct them that before making use of the tables they must find that the injury is permanent. C. J. Volume 17, pg. 1081.

Florida Central & T. R. R. v. Brunner, 26 SE 730:

In this case the Georgia Supreme Court holds the instruction on mortality tables as incorrect and misleading, states there has been much confusion in many instances, and formulates for the guidance of courts, a series of instructions which should be given on the differing conditions in those cases in which mortality tables may be admissible as evidence. These instructions are lengthy and denote the care and detail which is essential in giving instructions based upon such tables.

Washington & G. R. Co. v. Tobriner, 147 U. S. 571, 37 L. Ed. 284:

In an action for personal injuries the plaintiff may recover for future damages when the evidence justifies a finding that such damages are the inevitable and necessary result.

Strohm v. N. Y. Lake Erie & W. R. R., 96 N. Y. 304:

A new trial was ordered on account of admission of evidence of a doctor as to disorders into which symptoms might develop. Future consequences, reasonably to be expected to follow, may be given in evidence, but they must be such as in ordinary course are reasonably certain to ensue. Consequences that are contingent, speculative or merely possible are not proper. It is not enough that injuries may develop into more serious conditions, or likely to develop. There must be a degree of probability that amounts to reasonable certainty.

Main v. Grand Rapids G. H. & M. R. R., 174 N. W. 157:

Plaintiff had scar and nervous headaches. Alleged permanent disfigurement and future great bodily pain. Defendant claimed court in charge, in effect, authorized the jury to award damages for claimed headaches as permanent injuries, as to which there was no proof, and to conjecture as to recurrences concerning which there was no proof amounting to reasonable certainty. The trial court in charge said "if you find nervous system impaired * * * you will consider how long such condition may continue as far as the evidence shows."

The higher court stated: "The instruction should be confined to such damages as are proximately shown by the evidence, with reasonable certainty, to result. Only such future damages are recover-

able as evidence makes reasonably certain will necessarily result from the injury."

Ayres v. Del. L. & W. R. R., 158 N. Y. 254:

A girl's knee and spine were injured, which required cast, braces, etc. She still wore brace at the time of trial and the evidence showed she limped. The doctor testified he could, with reasonable certainty, state his opinion as to the length of time the condition of the spine would continue, and said probably more or less as long as she lived.

The defendant asked the court to charge there was no ground to find future damages to knee. The Court said: "There was no request to charge that the jury could not find any permanent damages * * * but simply any future damages. While future inconvenience might be slight and of short duration, defendant is not entitled to have it altogether withdrawn from consideration."

(This indicated that the court considered permanent injuries could not be found, and there is a distinction between future and permanent damages as such).

Daigneau v. Grank Trunk R. R. Co., (Mass.), 153 Fed. 593:

Plaintiff wrenched and bruised his back. The Court stated that the plaintiff is entitled to recover for such future consequences of the injury inflicted as the proofs showed are reasonably certain to result. The plaintiff has the burden of proof. Evidence which leaves the matter entirely

in doubt or establishes a mere possibility of future damages does not satisfy the rule which requires proof that future consequences are reasonably certain to ensue. The preponderance of evidence showed plaintiff would recover in great degree. A new trial was ordered unless $2000 of $6500 was remitted.

U. S. Cast Iron Pipe & Foundry Co. v. Eastham, 237 Fed. 185:

A complaint alleged the injuries permanently rendered the plaintiff less able to work; the evidence of plaintiff's doctor was that it would be twelve months before plaintiff would recover the use of his arm and there was no other evidence tending to show to what extent the disability would decrease the earning power. The Court said that charge that jury should, if they found for plaintiff assess damages sufficient to compensate for all damage plaintiff was found to have suffered was reversible error unless the attention of jury was called to fact it could not assess for decreased earning capacity shown by the physician's testimony, as such damages are nominal where evidence does not furnish a basis for substantial damages for decreased earning capacity.

At page 188: "The jury is not allowed to invade the realm of supposition to arrive at the compensation to be awarded the plaintiff for this element of damages."

New trial was ordered.

Seigfried v. Pa. R. R., 55 A. 1061:

Having admitted Carlisle Tables to show ex-

pectancy of life, the judge should have more carefully guarded the effect of the evidence by directing the attention of the jury to the circumstances affecting the duration of the life in question.

The value of mortality tables will depend very much on health, habits, social surroundings, and other circumstances and attention of juries should be pointedly called to those qualifying circumstances. (Steinbrunner v. Pitts. Ry. Co.)

It is not sufficient to say, as the court did, that the tables were of some aid, but not conclusive. All the circumstances affecting the probable duration of plaintiff's life as disclosed by the evidence, or concerning which there was testimony, should have been called to the attention of the jury. Unless this is done, and in a very pointed and direct way by the court, mortality tables are very likely to have more weight with the jury than should be given. Judgment reversed.

Mason v. Lord, 40 N. Y. 476:

Note: This case, as well as the following one, holds that it is error for a court to find a fact unsupported by evidence, or to refuse to find a fact proved by uncontradicted evidence.

Putnam v. Hubbell, 42 N. Y. 106:

A referee has no right to find a fact * * * in the absence of any proof tending to establish it, any more than a judge upon trial has, under like circumstances, the right to submit such a question to a jury. If the judge should so submit it to the

jury he commits a legal error, which upon proper exception taken, may be reviewed by this court.

The Grecian Monarch, 32 Fed. 635:

A seaman was injured in a fall, was unconscious two or three days and in the hospital three months; he complained of pain in his back continuing to the time of trial, four years, preventing any continuous work. The court said there was no evidence of chronic debility in support of permanent disability and reduced the damages from $3638 to $1200.

The Iroquois, 113 Fed. 96:

A seaman had his leg broken and was ten weeks without medical attention; his leg was amputated; he was twenty years old and in good health and strength. The court stated that he could do light work, and based upon this and upon his pain and suffering and the fact the injury would be permanent he was entitled to $3000.

Sheyer v. Lowell (Cal.) 66 Pac. 307:

Plaintiff's knee was injured and he was under care of physicians for two months; at the time of trial nearly a year later he had not recovered. $300 was given.

Leeson v. Sawmill Phoenix, (Wash.) 83 Pac. 891:

Plaintiff was working at a lathe and was struck and ruptured. Verdict was ordered reduced or a new trial granted. Evidence showed that since quitting mill plaintiff had engaged a small part of

the time in some occupations not requiring much physical exertion. At page 895, the Court: "We believe the sum of $3500 would be fair and ample compensation and much more in accord with what is right in the premises. An excessive verdict in a case like this is not only an injustice to the defendants, but it is a menace to the welfare of the state and should not be upheld."

Klein v. Phelps Lumber Co., 135 Pac. 226:

Negligent blasting; plaintiff knocked senseless; injury to head, foot, and was nervous and weak. Recovery was difficult. Plaintiff was about fifty-two years of age. There was a depression on his skull and physicians testified "he may never recover." We are unable to say under those circumstances that a verdict for $2000 is excessive.

Missouri Pac. Ry. Co. v. Tex. Pacific Ry. Co., 41 Fed. 311:

A woman who was keeping a board car had her leg broken, arm dislocated and back, shoulder and side injured in a collision. At time of trial, after two years, plaintiff who had been a strong healthy woman, was "hardly able to dress herself." The state court awarded $10,000 but the federal court reduced this amount to $5000 on the ground it was excessive, and $5000 was ample.

Hamburg American Co. v. Baker, 185 Fed. 60:

Plaintiff was forty-eight years old and foreman, strong and vigorous; due to negligence of defendant he was "entirely disabled for life"; vertebrae

in his back were broken; he had suffered much and would continue to suffer and testimony showed his debility was of a progressive character. $4500 was allowed because of the character of the injury and the permanent disability.

The Anchoria, 113 Fed. 982:

Injury was conceded to be very serious; plaintiff was unconscious several days; compound fracture of the leg necessitated several operations and intense agony; leg was shortened three inches and stiff; in consequence plaintiff became permanently disabled. $6000 was held reasonable.

Louisville & N. R. Co. v. Subant, 96 Ky. 197: 27 S. W. 999 (Century Digest Vol. 15, Column 2114):

In an action for personal injuries where the evidence fails to show any permanent injury whatever, a verdict for $6000 is excessive.

Wood v. Louisville and N. R. Co., 88 Fed. 44:

A verdict for $8000, for the loss of one foot and toes on the other foot by a brakeman, ordered to be cut in half. The court expresses its reluctance to interfere with verdicts but states that the courts must see that justice is done.

Engler v. W. U. Tel. Co., 69 Fed. 185:

At page 187: "The argument that juries . . . are disposed to give heavy damages in actions for personal injuries against corporations is undoubtedly true. But the records of this court will show

that it has never hesitated where the amount was deemed excessive to set such verdicts aside."

The following additional cases are cited in support of Specifications of Error IV (2) and IX, pages 29 ad 40 of Brief of Plaintiff in Error:

White v. Milwaukee St. Ry. Co., (Wis.) 21 N. W. 524:

The jury in the lower court found that "plaintiff sustained temporary injury to leg, which may prove permanent." Plaintiff had introduced testimony that she had not recovered from the injury and it might be permanent. The Supreme Court states: "A mere possible continuance of disability by reason of an injury is not a proper element of damages to justify a jury in assessing damages for future or permanent disability, it must appear by the proofs that continued or permanent disability are reasonably certain to result." "It is fair to assume that the jury predicated their assessment of damages in part upon the possibility of permanent injury. This is error." Judgment reversed.

McBride v. St. Paul (Minn.) 75 N. W. 231:

The lower court charged "you have a right to take into consideration * * * also, if there is any evidence to sustain it, the probability or improbability of this accident resulting in any permanent injury to plaintiff's health." The higher court said: "In our opinion this part of the charge is erroneous. The plaintiff is not entitled to re-

cover for permanent injury unless there is reasonable certainty that the injury will be permanent."

Meeter v. Manhattan Co., 75 N. Y. S. 561:

Plaintiff's physician was asked "Can you say with reasonable certainty whether this injury is likely to be permanent?" He replied "It is likely to be permanent in the sense that it will improve somewhat but she is not likely to ever get entirely over it." He testified further that the disease tended to shorten life in many cases. The lower court charged "If you consider she is permanently injured you may award compensation for that. When I say 'if you consider' I mean if you consider from the evidence."

The higher court states "In view of what preceded it is evident that sufficient weight was not given to the true rule that should be applied in regard to giving damages for permanent personal injury in cases of this kind." In the reception of evidence and in the efforts made to exclude what was regarded by the defendants as incompetent and in the charge of the court, the effect was to some extent to permit the jury to understand that they were at liberty to award damages for injuries which were likely to be permanent, instead of confining their verdict to damages for such injuries as would with reasonable certainty be permanent."

Lawrence & Comick

Attorneys for Plaintiff in Error.

No. 3580

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COMPANY, a Corporation,

Plaintiff in Error, Petitioner,

vs.

MIKE KOSO,

Defendant in Error.

PETITION FOR REHEARING

and

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

Filed this.....day of May, 1921.

.....

Clerk U. S. Circuit Court of Appeals.

Service of two copies acknowledged this..... day of May, 1921.

.....

Attorneys for Defendant in Error.

Courier Print

No. 3580

UNITED STATES
CIRCUIT COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED VERDE EXTENSION MINING COMPANY, a corporation,

Plaintiff in Error,
Petitioner,

vs.

MIKE KOSO,

Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR REHEARING.

Comes now the plaintiff in error in the above cause and respectfully petitions this honorable Court for a rehearing of the cause. This Court did on May 2, 1921, affirm the judgment of the United States District Court of Arizona in favor of the defendant in error, and filed opinion on said date. This petitioner states as grounds for this application the following:

I.

The Court, by its opinion and page 6 thereof, indicates that the situation and facts in reference to tes-

timony by Koso relating to his injuries have been confused, and the Court has evidently assumed by its premise and statement, "In view of the fact that there was evidence tending to show that the injuries which the plaintiff said he received were permanent in character," that the plaintiff Koso himself, or someone for him, testified that he received or suffered from an injury to his hand or hernia as a result of the accident, or at all, whereas the testimony shows that he did not so plead and did not so state in his personal testimony, or did anyone for him, but the physician testified he found this condition on an examination over two years after the accident, he did not testify and there was no testimony that these conditions of hand and hernia were a proximate, or any, result of the accident, the injuries about which Koso testified having been found by the physician to be repaired by nature and united; and this Court apparently omitted from its consideration the grounds stated in Specification of Error X and in the authorities cited by plaintiff in error, and relied upon as a principal point, that evidence tending to prove permanency must be evidence to a reasonable certainty; and the omission to consider or grasp the said point is further shown by the fact that the Court has cited in support of its assumption that the evidence tended to show permanency, Tweedy v. Inland Brewing Co., wherein the case was remanded on the ground that injuries of a similar kind, even

when a doctor testified specifically the condition would become permanent, could not be considered permanent.

II.

The Court in rendering its decision upon the instruction in regard to elements of permanent damages (Specification of Error IX), on page 8 of the opinion, has apparently omitted to notice and to consider (1) that the said instruction is quoted substantially in Inspiration Consolidated Copper Company v. Lindley, 20 Ariz. 101, where it was specifically applied to **permanent** disability as follows: "No fixed rule exists for estimating the damages to be recovered by one who is permanently disabled from laboring through the negligence of another; the most that can be done is to instruct the jury in general terms to award a fair and reasonable compensation, taking into consideration what plaintiff's income would probably have been, how long it would have lasted, and all the contingencies to which it was liable." (2) That this was the specific instruction on elements of damage "if you find for the plaintiff," although the Court charged the jury it was to determine whether the injuries were permanent or temporary, and it might find the one or the other; and (3) that courts construe exceptions with reference to issues and evident understanding of court and counsel at the time.

III.

The decision of the Court in reference to Specifi-

cation of Error I, on pages 8 and 9 of the opinion, is based upon the premise that the lower Court made no ruling in denial of the motion for cost security until August, 1920, or after the trial. This statement is founded upon a typographical error in the Transcript of Record, page 17, which was printed under the supervision and control of the Courts and this petitioner, under rule of court, had no control over or part in the said printing. The said error was brought to attention of this petitioner only when the brief of the defendant in error was served on February 9, 1921, and immediately this petitioner, by its attorneys, communicated with the Clerk of the United States District Court for Arizona, at Phoenix, Arizona, as follows:

Re: Koso v. United Verde Extension Mining Company.

"On page 17 of the transcript of record in the above case, as said transcript has been made up and printed by the Clerk of the Circuit Court of Appeals, there is a typographical error. At the bottom of the page the following notation is made: 'Minutes of Court—August 4, 1920—Order Overruling Motion for Security for Costs.' This order was, as your records will show, made on August 4, 1919. Mr. Struckmeyer, in his brief, however, has taken the date 1920 as correct and argues that the order was not made until after the trial, which occurred in March, 1920. In view of this situation, and in order to notify the Clerk of the Circuit Court of Appeals, we would ask that you certify to him that the records of your

> Court show that the order was made on August 4, 1919, and that the error in the printed transcript is typographical and one for which neither party is responsible since the record was made up and printed by you and the Clerk of the Circuit Court of Appeals. This case comes on for hearing on February 14, and we would therefore ask that you send this certificate immediately so that the Circuit Court may have the necessary official notice."

And the following reply was received dated at Phoenix, Arizona, February 12, 1921:

> "Re: Koso vs. United Verde Extension Mining Company No. L-45 (Prescott).
>
> "Acknowledge receipt of yours of the 9th instant and same was not received until this date. However, I have prepared a certified copy of the Minute Entry of August 4, 1919, and forwarded same by special delivery to the Clerk of the Circuit Court of Appeals at San Francisco, Calif., to be used on the hearing of the above entitled cause. Yours truly,
>
> "C. R. McFALL, Clerk,
>
> "By Clyde C. Downing, Chief Deputy Clerk."

This petitioner is further willing and offers, if deemed by the Court to be its duty or of aid, to procure such additional proof as may be necessary to enable this Court to order said transcript corrected to show the true state of the record, and respectfully submits that this ground should be reconsidered on the basis of the true fact and record.

IV.

The Court has misunderstood the argument of

plaintiff in error upon, and the grounds of, Specification of Error II, discussed upon pages 9 and 10 of the opinion; the point of plaintiff in error being that under Arizona law requiring that the workman shall make his election of remedies **by the institution of suit,** this plaintiff should have been held to have elected such action as his facts fell within and should not have been permitted to make an election after two years had elapsed; and the Court has seemingly confined the scope of the objection and exception to the ruling of the lower Court to the demurrer to the first cause of action, although, it is submitted, it is a reasonable reading of the Minute Order (Tr. 18 and 19) that said objection and exception covered and was intended to cover both the points mentioned in said Minute Order, and was directed to the order of the Court which permitted the plaintiff to elect.

FAVOUR & CORNICK,
Attorneys for Petitioner, United Verde Extension Mining Company.

This is to certify that the undersigned are counsel for the plaintiff in error in the above cause; that in their judgment the above petition for rehearing is well founded; that the statements made in respect to the error in the record are, based upon the information furnished by the Clerk of the United States District Court for Arizona, true and correct, and this petition is not interposed for delay, but in order that correction may be made in the erroneous premise of

fact and the opinion predicated thereon; and that the Court may have brought to its attention apparent misunderstanding of facts and points essential to the determination of the cause.

A. H. FAVOUR,
A. G. BAKER.

BRIEF AND ARGUMENT IN SUPPORT OF PETITION FOR REHEARING.

Argument on Ground I.

The first ground is that the opinion (page 6) that it was within the sound discretion of the lower Court to permit the introduction of mortality tables is predicated by the Court upon the statement "there was evidence tending to show that the injuries which plaintiff said he received were permanent in character." The only injuries which Koso said he received were to his back, shoulder-blade and toe (Tr. 35); he did not testify he had any injury to his hand. His doctor did not testify that the loss of power of the hand was due or could have been due to any of the injuries Koso said he received in the accident. There is the same lack of connecting evidence in the case of the hernia. The doctor testified that the injuries which Koso said he had received, that is, to his shoulder-blade and back, had been "repaired by nature and united." It is submitted there was no reason for defendant to object to such testimony, which defendant considered under the literal and clear wording to tend to prove only a temporary injury at the most, which had been healed. The injuries Koso "said he received" were admittedly repaired and united and there was no intimation in the testimony of the doctor that they were not fully

healed, much less any testimony of permanency. The point on which the plaintiff in error cited numerous cases, stated and raised by Specifications of Error 5 and 10, and emphasized in its Brief as being a prime contention, is the lack of that kind of substantial evidence and evidence to a reasonable certainty of permanent injury which is required by the law before mortality tables are admissible or recovery can be permitted for permanent injury. The petitioner believes it is apparent from the opinion that this Court, while recognizing that evidence of permanency is a necessary condition prerequisite, proceeded upon the assumption, which is not the fact, that the injuries which Koso said he received, were the same conditions which his doctor said he found on an examination two years afterward, and on that assumption came to the conclusion there was evidence tending to show permanent injury; and it is manifest that the decisions cited by plaintiff in error concerning the necessity for substantial evidence in order to constitute any evidence of permanency, were not brought to the attention and were not in consideration of the Court in rendering its decision, and the citation by the Court of the case of Tweedy vs. Inland Brewing Company shows further that this point was overlooked and not considered and weighed by the Court, since the higher Court held in that case that there was not evidence justifying any theory of permanent injury, directly in point with this plaintiff in error.

The Federal appellate courts review the evidence on error. A motion for directed verdict raises the question. There was such a motion and exception in this cause and Specification of Error X also states the issue.

Pacific Casualty Co. vs. Whiteway (CCA 9th) 210 Fed. 782:

> A verdict is not subject to review unless there is an absence of substantial evidence; a **request for peremptory** instruction and exception.

Jones Bank vs. Yates, U. S. 60 L. Ed. 788:

> The Court reviewing on error will inquire whether there is substantial evidence to support the findings.

Oregon-Wash. R. R. vs. Branham (CCA 9th) 259 Fed. 555:

Vol. 3 Corpus Juris, 1374:

> Assignment of error in refusing to direct verdict raises the legal question whether there is any evidence legally tending to sustain the verdict.

Jenkins vs. Skelton (Ariz.) 192 Pac. 249.

It is submitted that the cases show the law to be that evidence of permanent injury in order to be any legal evidence must be substantial and to a reasonable certainty, and clearly such substantial evidence is meant in the decisions cited by this Court at

the bottom of page 7 of its opinion, which cases hold that mortality tables are admissible in cases of permanent injury, which is an undisputed principle of law, but this statement must be held to mean that there must be that substantial evidence required by the decided cases, and that evidence of permanent injury is a condition precedent to admissibility.

Also the evidence of permanency was clear, convincing and apparent in the following cases decided by this Court:

Northern Pacific Co. vs. Chervenak (CCA 9th), 203 Fed. 884;

Colussa vs. Parrott (9th CCA), 162 Fed. 276.

And in the following cases cited in Brief and Abstract of Plaintiff in Error the rule is applied, and judgments reversed where evidence of permanent injury was not substantial and to a reasonable certainty:

McGregor vs. R. I. Co., 60 Atl. 761;
Mott vs. Detroit Co., 79 N. W. 3;
W. U. Co. vs. Morris (CCA), 83 Fed. 992;
Leach vs. Detroit Co., 84 N. W. 316;
Tenney vs. Rapid City, 96 N. W. 96;
Foster vs. Village Bellaire, 86 N. W. 383;
Thayer vs. Denver Co., 154 Pac. 691;
Hardy vs. Milwaukee Co., 61 N. W. 771;
Snyder vs. Great Northern, 162 Pac. 703;

White vs. Milwaukee Co., 21 N. W. 524;

McBride vs. St. Paul, 75 N. W. 231;

Meeter vs. Manhattan Co., 75 N. Y. S. 561;

Filer vs. New York Central, 49 N. Y. 43;

Ingebretson vs. Minn. Co. (Iowa), 155 N. W. 327.

Block vs. Milwaukee Co., 46 Am. St. Rep. 849.

Argument on Ground II.

The instruction quoted in Specification of Error IX, directed the jury, if they found for plaintiff, to consider elements of permanent damage. The instruction is evidently taken from the Lindley case, where it was specifically applied to permanent injuries. This was a specific instruction; the case cited in this Court's opinion (Vicksburg vs. Meridian Co.), considers the effect of incidental observations of the judge and states that the impression made by peremptory instruction would not be removed by such observations.

Under this specific charge the jury was authorized and required to consider those elements even if they found temporary injury. The exception to the presuming of permanency (Tr. 56), in view of the understanding of the issue as shown by the additional remarks of the judge, would, it is submitted, extend to this instruction under the authorities following:

Winfrey vs. M. K. & T. Co. (CCA), 194 Fed. 808:

Where an exception makes general reference to a topic discussed in a charge and the topic constitutes a definite part of the charge clearly distinguished from other parts, the exception is sufficient for review.

Harkins vs. Brown (CCA), 108 Fed. 576:

While assignments of error relating to rulings on the admission of evidence cannot be broader than the exceptions taken on trial, yet such exceptions must be construed with reference to the issues before the jury and the evident understanding of court and counsel at the time they were made as to their grounds and scope.

Pritchett vs. Sullivan (CCA), 182 Fed. 480:

Where an instruction states a specific proposition of law on a particular subject, obviously with deliberation and not inadvertently, a general exception is sufficient to challenge the correctness of such proposition.

Vol. 3 Corpus Juris, 1342:

In a number of jurisdictions either by reason of rule of court or because the court has discretion, the appellate court will notice plain errors. (U. S. Cases.)

Argument on Ground III.

This point respecting error in date needs no enlargement, except to state that it is often the reasonable and convenient practice of the District Court

having several divisions with one judge to make its rulings on preliminary motions without notice or presence of counsel, preserving exceptions for the parties, and plaintiff's counsel may have received no notice of this ruling. Further evidence of the error in date is shown by the fact that the said Minute Order comes at a place in the Transcript, arranged by the Clerk, which indicates it was not made in August, 1920.

Argument on Ground IV.

The Court has followed the interpretation given in the Brief of Defendant in Error to the words in Brief of Plaintiff in Error (page 17): "The Court erred in overruling or failing to act upon the demurrer." This was simply an alternative wording and was so stated for the reason that when the demurrer to the whole complaint was being presented the plaintiff stated he elected to proceed under Count I and the Court immediately, without consent of defendant, made the order that plaintiff so elected, and then overruled defendant's demurrer to Count I. The defendant excepted to the whole ruling. This petitioner submits that the record reasonably shows that the exception was to the whole proceeding in which the court ordered the election and overruled the demurrer to Count I. The argument in our Brief shows this was the point raised and no complaint was made of the failure to act except as the order of election was substituted by the Court as a ruling on

the demurrer. The Court has seemingly been misled into an incorrect understanding of the ground for this assignment and the argument thereon, and the plaintiff in error has thereby been placed in the position of contending for a point without merit, and for which it does not contend, to wit, that it has asked the Court to "hold that the limitation of the statute has been rendered ineffectual." Our point, as stated on page 18 of the Brief, is that the law of Arizona, Sec. 3176, provides that "any suit brought by the workman for a recovery shall be held as an election to pursue such remedy exclusively"; that a workman has two years to bring suit and make this election; that the only election this plaintiff made within two years was by the institution of his suit since he made no other election; that it was plaintiff's duty to make his election before the two years' limitation and not the Court's duty to order it to be made; that after the two years the Court should not have permitted an election by plaintiff and had no power to do so under the law, but should have held the plaintiff to such cause of action as the facts in his whole complaint brought him within, plaintiff having pleaded facts constituting negligence of defendant; that by allowing an election after two years the statute requiring election by institution of suit and the two-year limitation of the Employers' Liability Law is rendered ineffective, since by pleading two inconsistent Counts the election of remedies

could be postponed by a workman at least for three years under the Arizona law providing that summons may be issued and served any time within a year after institution of action.

Behringer vs. Inspiration Co., 17 Ariz. 232, at page 236:

The Court says: "His personal representative is then relegated to an action . . . . . under the so-called Lord Campbell's Act, or under the Employers' Liability Act . . . . . according as his facts fall within the one or the other."

Jerome Verde Co. vs. Riley (Ariz), 192 Pac. 429:

The same facts cannot establish negligence and mere accident. The facts establish either negligence as known to the law or they establish a condition free from negligence.

Calumet & Arizona Co. vs. Chambers, 20 Ariz., at page 62:

The Court states: "Of course, justice and fairness require that the plaintiff be held to bring himself within the conditions prescribed by the law relied upon, and confine his right to recovery to the law he relies upon in his complaint. If he expressly alleges, as this plaintiff has done, that he relies upon the Employers' Liability Law for a recovery, he cannot thereafter take the **inconsistent position** that the facts stated in his complaint, though insufficient to constitute a cause of action under such law, yet they are sufficient to constitute a cause of action, for instance, for negligence."

Respectfully submitted,

FAVOUR & CORNICK,

Attorneys for Petitioner.

No. 3584

United States Circuit Court of Appeals

For the Ninth Circuit.

JOHN C. DAVIS, as Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,

Plaintiff in Error,

vs.

E. T. WILLEY,

Defendant in Error.

Transcript of Record.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California.

Second Division.

Filmer Bros. Co. Print, 330 Jackson St., S. F., Cal.

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INDEX TO THE PRINTED TRANSCRIPT OF RECORD.

[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

Index.

In the District Court of the United States, in and for the Northern District of California.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

Amended Complaint.

Plaintiff complains of defendant, and for cause of action alleges:

I.

That on the 20th day of June, 1914, a petition was filed in the District Court of the United States in and for the Northern District of California, in bankruptcy, by Charles F. Willey, numbered 8788 in the bankruptcy files of said court, which petition prayed that said Willey be adjudged bankrupt, and that thereafter on June 26th, 1914, said Charles F. Willey was by said court duly adjudicated a bankrupt; that thereafter, on April 3, 1915, and at the first meeting of creditors called and held before Fred A. Copestake, Referee in Bankruptcy, to whom said matter in bankruptcy had been referred by said court, plaintiff above named was duly appointed Trustee in Bankruptcy of the estate of said bankrupt, and thereafter plaintiff qualified as such trustee, and has ever since been and now is the duly appointed, qualified and acting Trustee in Bankruptcy of the estate of said bankrupt.

II.

That in the months of January to May in the year 1912, said [1*] Charles F. Willey was indebted to one Edward McGinn, and an action was then pending in the Superior Court of the State of California in and for the County of Mariposa for the recovery of said debt; that the trial of said action took place on or about February 8th, 1912, and the cause was then submitted to the court for decision; that thereafter and pending the decision and judgment in said action, said Charles F. Willey, defendant in said action, transferred to his brother defendant herein, the said E. T. Willey, the sum of three thousand three hundred eighty-seven ($3,387) dollars, or thereabouts, moneys of the said Charles F. Willey; that said transfer was made secretly and was made without consideration, and with the intent and for the purpose of defrauding the said Edward McGinn out of the moneys owing to him by the said Charles F. Willey, and for the purpose of preventing the enforcement and collection of any judgment which might be rendered in said action against said Charles F. Willey; that said transfer was made to said defendant E. T. Willey with the said intent and for the said purpose with the full knowledge and consent of said E. T. Willey. That at the time of the making of said transfer of said moneys said Charles F. Willey had no property, other than that transferred, sufficient to pay the debts which he then owed to Edward McGinn, or any part thereof.

*Page-number appearing at foot of page of original certified Transcript of Record.

III.

That judgment was rendered in said action in favor of Edward McGinn on May 3, 1912, against said bankrupt; that said bankrupt appealed to the District Court of Appeal of the Third Appellate District of the state of California from the said judgment and said appeal was determined and the said judgment affirmed by the said District Court of Appeal on April 8th, 1914; that a petition was made by said bankrupt for a hearing of the same [2] matter by the Supreme Court of said State, and said petition was denied by said Supreme Court on June 6th, 1914, and the remittitur in said matter was made to the aforesaid Superior Court on June 8th, 1914,and that said bankrupt thereupon, on June 20th, 1914, filed his petition for voluntary bankruptcy, and named in the schedule accompanying said petition Edward McGinn as sole creditor and said judgment was the sole debt from which discharge was sought. That in the month of October, 1913, an execution was duly issued out of the said Superior Court upon the said judgment against the property of said Charles F. Willey, directed to the Sheriff of the County of Tuolumne, State of California, in which County said Charles F. Willey resided, which said execution was partially satisfied, and there still remains due and unpaid on said judgment over $1,000.00, and at no time since the rendition of said judgment has there been sufficient money or property subject to levy by execution against the said Charles F. Willey out of which the balance due on said judgment, or any part

thereof, could be satisfied. That said Sheriff has not returned said execution into said court, and said Sheriff has informed plaintiff that said execution was lost and cannot be found.

IV.

That said creditor Edward McGinn at the time of said transfer or at any time prior to the commencement of said bankruptcy proceedings and the adjudication of said Charles F. Willey as bankrupt, had no knowledge or notice of the said transfer; that said transfer was at all times kept hidden and concealed from said Edward McGinn by said Charles F. Willey and E. T. Willey; that plaintiff herein at the first meeting of the creditors of said bankrupt on April 3, 1915, first received information that said bankrupt had transferred certain of his moneys to defendant; [3] that before plaintiff learned anything further as to the facts of said transfer, and on May 20th, 1915, the said bankrupt applied to the aforesaid District Court of the United States for a discharge in bankruptcy; that upon the hearing of said application and the objections of the creditor Edward McGinn thereto, said Court on June 19, 1915, referred the matter back to the Referee in Bankruptcy for hearing upon said objections; that said hearing was held before Fred A. Copestake, Referee in Bankruptcy, on February 2, 1916; that Charles F. Willey and E. T. Willey were examined before the referee at said hearing, and plaintiff learned from said examination the facts relative to the transfer of said moneys and the fraudulent nature of the same as hereinbefore alleged.

V.

That plaintiff, as such trustee, has insufficient assets with which to pay in full the debts of said bankrupt, or any part thereof, but on the contrary the assets of said estate will be insufficient to pay any part whatever of the debts of said bankrupt.

VI.

That plaintiff has demanded of defendant that he pay over to plaintiff the said sum of $3,387.00, with interest thereon; that defendant refused and still refuses to pay over to him the said sum, or any part thereof.

WHEREFORE, plaintiff prays judgment against defendant for the sum of three thousand three hundred and eighty-seven ($3,387.00) dollars with legal interest thereon from February 16th, 1912, with his costs.

J. C. WEBSTER,
WILLIAM H. BRYAN,
Attorneys for Plaintiff. [4]

State of California,
County of Tuolumne.

John C. Davis, being duly sworn, says: That he is the plaintiff in the foregoing action; that he has read the complaint in said action, and knows the contents thereof, and that the same is true of his own knowledge, except as to the matters therein stated on information or belief, and as to those matters he believes the said complaint to be true.

JOHN C. DAVIS.

Subscribed and sworn to before me, this 26th day of June, 1918.

[Seal] ERIC J. SEGERSTROM,
Notary Public in and for the County of Tuolumne, State of California.

Receipt of a copy of the within Amended Complaint admitted this 29th day of July, 1918.

WILLIAM E. BILLINGS,
Attorney for Plaintiff.

[Endorsed]: Filed Jul. 30, 1918. Walter B. Maling, Clerk. By Thomas J. Franklin, Deputy Clerk. [5]

In the District Court of the United States in and for the Northern District of California.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff,

vs.

E. T. WILLEY,
Defendant.

Answer of Defendant.

Comes now the above-named defendant and answering plaintiff's amended complaint on file herein, denies, alleges and admits as follows:

1. Answering paragraph II of said complaint, said defendant denies that in the months of January to May in the year 1912 or at any other time or at all that said Charles F. Willey was indebted to one

Edward McGinn; denies that thereafter or at all and pending the decision and judgment in the action mentioned in said paragraph, said Charles F. Willey, defendant in said action, transferred to his brother, defendant herein, the said E. T. Willey, the sum of three thousand three hundred eighty-seven dollars or thereabouts or any other sum, moneys of the said Charles F. Willey; denies that said transfer was made secretly and denies that said transfer was made at all or was made without consideration, and with the intent and for the purpose of defrauding the said Edward McGinn out of the moneys owing to him by the said Charles F. Willey, and for the purpose of preventing the enforcement and collection of any judgment which might be rendered in said action against said Charles F. Willey or anyone else; denies that said transfer was made to said defendant E. T. Willey with the said or any intent and for the said or any purpose with the full knowledge and consent of the said E. T. Willey. Denies that at the time of making the said transfer of said moneys said Charles F. Willey [6] had no property, other than that transferred, sufficient to pay the debts which he then owed to Edward McGinn or any part thereof and denies that he then or there or at all owed any debt or debts to the said Edward McGinn.

2. Answering paragraph III of said complaint, defendant denies that there still remains due and unpaid or due or unpaid on said judgment the one thousand dollars or any other sum except a very small amount; denies that at no time since the ren-

dition of said judgment has there been sufficient money or property subject to levy by execution against the said Charles F. Willey out of which the balance due on the said judgment or any part thereof could be satisfied. Said defendant has no knowledge, information or belief concerning the allegations made in lines 18 to 20 inclusive of said paragraph III on page 3 of said complaint and basing his denial upon said ground denies that said sheriff has not returned said execution into said court, and denies that said sheriff has informed plaintiff that said execution was lost and cannot be found.

3. Answering paragraph IV of said complaint said defendant denies that said creditor, Edward McGinn at the time of said transfer or at any other time prior to the commencement of the said bankruptcy proceedings and the adjudication of the said Charles F. Willey as bankrupt, had no knowledge or notice of the transfer; denies that the said transfer was at all times or at all kept hidden and concealed or hidden or concealed from said Edward McGinn by the said Charles F. Willey and E. T. Willey or either of them; denies that plaintiff herein at the first meeting of the creditors of said bankrupt, on April 3, 1915, first received information that said bankrupt had transferred certain of his moneys to defendant. And in this behalf defendant [7] alleges that the said plaintiff and the said Edward McGinn and each of them had possession of sufficient facts to have advised them of said transfer, if any there was, if they had been diligently pursued. Denies that said plaintiff learned from the examination

before the said referee in bankruptcy mentioned in said paragraph of said complaint, the or any facts relative to said or any transfer of the said moneys or the fraudulent nature thereof as hereinbefore or otherwise alleged and denies that said or any transfer was fraudulent.

4. Answering paragraph V of said complaint defendant alleges that he has no knowledge, information or belief sufficient to enable him to answer the same and basing his denial on said ground denies that plaintiff as such trustee has insufficient assets with which to pay in full the debts of the said bankrupt or any part thereof.

As a further, distinct and separate defense to said complaint said defendant alleges: That said alleged cause of action purported to be stated in said complaint is barred by subdivision 4 of section 338 of the Code of Civil Procedure of the State of California.

WHEREFORE, said defendant prays that he be hence dismissed with his costs herein.

WILLIAM E. BILLINGS,
Attorney for Defendant. [8]

State of California,
County of Tuolumne,—ss.

E. T. Willey being first duly sworn deposes and says: That he is the defendant in the above-entitled action. That he has read the foregoing answer and knows the contents thereof; that the same is true of his own knowledge except as to the matters therein stated on information and belief and as to those matters he believes it to be true.

E. T. WILLEY

Subscribed and sworn to before me this 8th day of October, 1918.

[N. S.] JAMES OPIE,

Notary Public in and for said County and State.

Receipt of copy of within answer is hereby admitted this 11th day of October, 1918.

J. C. WEBSTER,
WILLIAM H. BRYAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 11, 1918. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [9]

In the District Court of the United States, in the Southern Division, Northern District of California.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff,

vs.

E. T. WILLEY,
Defendant.

Amendment to Amended Complaint.

Plaintiff by leave of Court first obtained, files this amendment to his amended complaint, amending the same by striking therefrom the words beginning with "that" on page 3, line 18 and extending to the end of line 20, page 3, and by inserting after the word "satisfied," on line 13, page 3, the words, "and that said sheriff has duly returned

said execution into said court satisfied to the amount of Four Hundred Thirty-seven and 50/100 ($437.50) Dollars only."

State of California,
City and County of San Francisco,—ss.

J. C. Webster, being duly sworn on oath, says: That he is one of the attorneys in the above-entitled action; that he makes this affidavit for the plaintiff because said plaintiff is absent from the City and County of San Francisco; that he has read the foregoing amendment to the amended complaint and knows the contents thereof, and that it is true.

J. C. WEBSTER.

Subscribed and sworn to before me this 28th day of August, 1919.

[Seal] C. M. TAYLOR,
Deputy Clerk U. S. District Court, Northern District of California. [10]

Received copy, Aug. 28, 1919.

WILLIAM E. BILLINGS,
Atty. for Deft. Willey.

[Endorsed]: Filed August 28, 1919. Walter B. Maling, Clerk. [11]

In the District Court of the United States in and for the Northern District of California.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff,

vs.

E. T. WILLEY,
Defendant.

Amendment to Answer.

Comes now the defendant above named and by leave of the Court first had and obtained amends his answer as follows:

As a further, distinct and separate defense to said complaint said defendant alleges:

That the said alleged cause of action purported to be stated in said complaint is barred by the judgment heretofore rendered in an action tried in the above-entitled court in equity, in which John C. Davis, Trustee of the Estate of Charles F. Willey, in Bankruptcy, was plaintiff and E. T. Willey and Mrs. Charles F. Willey were defendants and respecting the same alleged transfer that is the subject of this action, said action being No. 341 in Equity.

WILLIAM E. BILLINGS,
Attorney for Plaintiff.

State of California,
City and County of San Francisco,—ss.

E. T. Willey being first duly sworn deposes and

says: That he is the defendant in the above-entitled action. That he has read the amendment to the said complaint above stated and that the same is true of his own knowledge except as to the matters therein stated on his information and belief and as to those matters he believes it to be true.

E. T. WILLEY.

Subscribed and sworn to before me this 28th day of August, 1919.

[Seal] J. J. KERRIGAN,
Notary Public in and for said County and State. [12]

Receipt of copy of the within amendment is hereby admitted this 28th day of August, 1919.

J. C. WEBSTER,
WILLIAM H. BRYAN,
Attorneys for Plaintiff.

[Endorsed]: Filed August 28, 1919. Walter B. Maling, Clerk. [13]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff,

vs.

E. T. WILLEY,
Defendant.

Opinion.

J. C. WEBSTER and WILLIAM H. BRYAN, of San Francisco, for Plaintiff.

WILLIAM E. BILLINGS, of San Francisco, for Defendant.

VAN FLEET, District Judge:

This is an action at law by a trustee in bankruptcy to recover a certain fund alleged to have been transferred by the bankrupt to his brother in fraud of the rights of his creditors. It is admittedly prosecuted under the authority of Section 70–e of the Bankruptcy Act which provides that "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided, and may [14] recover the property so transferred, or its value, from the person to whom it was transferred, etc."

It is well established that the effect of this section is to clothe the trustee with no new or additional right in the premises over that possessed by a creditor, but simply puts him in the shoes of the latter and subject to the same limitations and disabilities that would have beset the creditor in the prosecution of the action on his own behalf; and the rights of the parties are to be determined, not by any provision of the Bankruptcy Act, but by the applicable principles of the common law, or the laws of the State in which the right of action may arise. In other words, the Bankruptcy Act merely permits the trustee to assert the rights which the creditor could assert but for the pendency of the

bankruptcy proceedings, and if for any reason arising under the laws of the State the action could not be maintained by the creditor, the same disability will bar the trustee. Collier on Bankruptcy (10 Ed.) 1042, f. and g.; In re Mullen, 101 Fed. 413; Holbrook v. First International Trust Co., 107 N. E. 665; Manning v. Evans, 156 Fed. 106.

The rights of the trustee being governed by these limitations, I am of opinion that the defense of the Statute of Limitations interposed by defendant must be sustained. That defense is based on section 338 of the Code of Civil Procedure of this State fixing the limitations of time within which actions must be commenced, subdivision four of which provides: "Within three years. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud or mistake." It appeared in evidence at the trial that in [15] an action brought in the State court by the defendant here against the sheriff to recover property seized by the latter in satisfaction of a judgment theretofore recovered by McGinn, the creditor in whose right the present action is sought to be maintained, against C. F. Willey, the bankrupt, whose estate the trustee represents, and which was tried in March, 1914, it was disclosed by testimony given in the presence of McGinn and his counsel that pending that suit there had been a surreptitious, clandestine and presumptively fraudulent, transfer on the books of a local bank by the judgment debtor

to his brother, this defendant, of a part of the same fund here sought to be recovered. This disclosure was of a character and the circumstances such as to put any reasonable man upon inquiry at the time as to the fraud, and to clearly indicate that an investigation would then have exposed to McGinn and his attorney the entire transaction set forth in the complaint and involved in the present action. But no such investigation was made, for what reason it does not appear, and this action was not commenced until more than four years after the creditor was thus made aware of the facts stated,

No principle is better settled in actions based upon fraud and where the rights of a party are dependent upon his diligence in discovering the fraud, than that means of knowledge is knowledge itself; that knowledge of facts which should put a reasonable man upon inquiry invests the suitor in legal contemplation with full knowledge of all that such inquiry would have developed. Wood v. Carpenter, 101 U. S. 135; Norris v. Haggin, 28 Fed. 275; Teall v. Schroder, 158 U. S. [16] 172; Archer v. Freeman, 124 Cal. 528; Bills v. Silver King Mining Co., 106 Cal. 9; Truett v. Onderdank, 120 Cal. 581; Burke v. Maguire, 154 Cal. 456.

The facts thus disclosed to the knowledge of the creditor more than four years before the bringing of this action clearly brings him, and the Trustee who represents him, within the terms of the Statute, as barring the maintenance of the action.

I have not overlooked the contentions of plaintiff as to the effect of Sec. 11–d of the Bankruptcy

Act, but it is sufficient to say without further discussion that I am wholly unable to sustain his view.

This conclusion as to the bar of the Statute renders it unnecessary to definitely consider the further defense of *res judicata,* although I am strongly inclined to the view that, if necessary, it would have to be sustained.

Judgment will go in favor of defendant dismissing the action and for costs.

[Endorsed]: Filed February 3d, 1920. Walter B. Maling, Clerk. [17]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff,

vs.

E. T. WILLEY,
Defendant.

Stipulation for Findings.

It is hereby stipulated that findings of fact may be made by the court upon trial and decision of the cause in the above-entitled action, and judgment entered thereon.

Dated February 5th, 1920.

J. C. WEBSTER and
WILLIAM H. BRYAN,
Attorneys for Plaintiff.
WILLIAM E. BILLINGS;
Attorney for Defendant.

Approved.

W. C. VAN FLEET,
Judge.

[Endorsed]: Filed Feb. 6, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [18]

In the Southern Division of the United States District Court for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff,

vs.

E. T. WILLEY,
Defendant.

Findings of Fact and Conclusions of Law.

In this cause heretofore tried before the court, (a jury trial having been in writing waived by the parties), I find the following facts:

I.

That on June 26, 1914, Charles F. Willey was duly adjudicated a bankrupt by the District Court

of the Uuited States, for the Northern District of California, and on April 3, 1915, John C. Davis, the plaintiff herein, was duly appointed trustee in bankruptcy of the estate of said bankrupt, and thereafter and prior to the commencement of this action, qualified as such trustee and has ever since been and now is, the duly appointed, qualified and acting trustee of the estate of Charles F. Willey, in bankruptcy;

II.

That in January, 1912, prior to said adjudication in bankruptcy, said Charles F. Willey was indebted to Edward McGinn, and an action was pending in the Superior Court of the State of California in and for the County of Mariposa, [19] in which said McGinn was plaintiff, and said Charles F. Willey was defendant, for the recovery of said debt; that said action was tried on or about February 8, 1912, and submitted for decision and that pending the decision and judgment in said action, Charles F. Willey transferred to his brother, E. T. Willey, defendant herein, the sum of three thousand three hundred and eighty-seven ($3,387) dollars, moneys of the said Charles F. Willey; that said transfer was made secretly, and without consideration, and with the intent and for the purpose of defrauding Edward McGinn out of the moneys owing to him by Charles F. Willey, and for the purpose of preventing the enforcement of any judgment which might be rendered in the aforesaid action against Charles F. Willey; that said transfer was made to E. T. Willey with said intent, for said purpose, with the

full knowledge and consent of E. T. Willey, and that at the time of making said transfer of said moneys, Charles F. Willey had no property other than that transferred, with which to pay the debt which he then owed said Edward McGinn, or any part thereof.

III.

That judgment was rendered and entered on May 3, 1912, in said action, in favor of Edward McGinn, and against Charles F. Willey for the sum of $———; that Charles F. Willey appealed from the said judgment to the District Court of Appeal, Third Appellate District of the State of California, where said judgment was affirmed on April 8, 1914; that thereafter Charles F. Willey, on June 20, 1914, filed his petition in the District Court of the United States for the Northern District of California, for voluntary bankruptcy, and named in the schedule accompanying said petition the [20] said Edward McGinn as a creditor, and the said judgment as a debt from which discharge was sought.

IV.

That an execution was duly issued out of said Superior Court upon said judgment, against the property of Charles F. Willey, directed to the sheriff of the County of Tuolumne, State of California, in which county said Charles F. Willey resided, and said execution was partially satisfied; that there still remains due and unpaid on said judgment more than $1,000.00 of the principal sum, besides interest.

V.

That upon the issuance of said execution, the said sheriff levied the same upon certain property as the property of Charles F. Willey, and seized and sold the same in partial satisfaction of said judgment; that thereafter E. T. Willey brought an action against the said sheriff, in the Superior Court for the County of Tuolumne, for the conversion of the property so seized by the said sheriff, and recovered judgment therein against the said sheriff for the value of the said property; that said action was tried in the month of March, 1914; that one J. C. Webster was counsel for the said sheriff in the trial of said action, and at the trial thereof testimony was given in the presence of said Webster and said McGinn by an officer of the First National Bank at Sonora to the effect that a transfer had been made upon the books of the bank by Charles F. Willey to E. T. Willey of certain moneys; that it appears from the evidence in this case that the said moneys so transferred were a part of the moneys transferred by Charles F. Willey to E. T. Willey, as hereinbefore found; that the disclosure of the said transfer at the said [21] trial was such as to put the said McGinn and this plaintiff upon inquiry as to the fraud in the said transfer, and to show that an investigation would then have exposed to Edward McGinn and J. C. Webster the entire transaction set forth in the complaint in the present action; that no such investigation was made prior to the month of April, 1915.

VI.

That heretofore this plaintiff commenced a suit in equity in the District Court of the United States, for the Northern District of California, against said E. T. Willey and Mrs. Charles F. Willey, wife of the said bankrupt; said suit being numbered 341 in equity, for the purpose of obtaining a decree requiring E. T. Willey and Mrs. Charles F. Willey to pay over to the plaintiff the same moneys sought to be recovered in this action, and setting up in the complaint in said suit the same fraudulent transfer by Charles F. Willey as is alleged in the complaint in this action; that said cause was thereafter tried in this court, and it was decreed by the Court that the defendant Mrs. Charles F. Willey had received certain of said moneys as a fraudulent transferee of Charles F. Willey, and that she pay over the same to plaintiff; that as to the defendant E. T. Willey the said suit was ordered dismissed and a decree duly entered to that effect; that no appeal was taken by the plaintiff in said action to the Circuit Court of Appeals, or other proceeding taken to review said order or decree dismissing the said suit as to E. T. Willey.

CONCLUSIONS OF LAW.

I conclude as a matter of law from the foregoing facts, that the present action is barred by the provisions of subdivision 4, of section 338 of the Code of Civil Procedure [22] of the State of California; and further that the action is barred by the order or decree dismissing as to defendant,

E. T. Willey the said suit numbered 341, in equity, in this court.

Dated February 20th, 1920.

WM. C. VAN FLEET,
U. S. District Judge.

Received copy of within proposed findings and conclusions of law.

WILLIAM E. BILLINGS,
Atty. for Deft.

[Endorsed]: Filed Feb. 20, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [23]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff,

vs.

E. T. WILLEY,
Defendant.

Judgment on Findings.

This cause having come on regularly for trial on the 28th day of August, 1919, before the Court sitting without a jury, a trial by jury having been specially waived by stipulation filed herein, William H. Bryan and J. C. Webster, Esqrs., appearing as attorneys for plaintiff, and William E. Billings,

Esq., appearing as attorney for defendant; and the trial having been proceeded with on the 29th day of August, 1919, and oral and documentary evidence upon behalf of the respective parties having been introduced and closed and the cause, after arguments by the attorneys, having been submitted to the Court for consideration and decision; and the Court after due deliberation, having filed its opinion and findings and ordered that judgment be entered herein in accordance therewith:

Now, therefore, by virtue of the law and by reason of the findings aforesaid, it is considered by the Court that plaintiff take nothing by this action and that defendant go hereof without day and that said defendant do have and recover of and from said plaintiff his costs herein expended taxed at $ ———.

Judgment entered February 20, 1920.

WALTER B. MALING,
Clerk. [24]

(Certificate to Judgment-roll.)

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, do hereby certify that the foregoing papers hereto annexed constitute the Judgment-roll in the above-entitled action.

Attest my hand and the seal of said District Court, this 20th day of February, 1920.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,

[Endorsed]: Filed February 20, 1920. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [25]

In the Southern Division of the United States District Court, for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

Notice of Decision.

To JOHN C. DAVIS, Plaintiff Above Named, and to J. C. WEBSTER and WILLIAM H. BRYAN, Attorneys for Plaintiff:

You and each of you will please take notice that judgment in the above-entitled case was rendered in favor of the defendant above named on the twentieth day of February, 1920.

Dated March 12, 1920.

WILLIAM E. BILLINGS,
Attorney for Defendant.

Receipt of copy of the within notice is hereby admitted this 12th day of March, 1920.

J. C. WEBSTER,
WLLIAM H. BRYAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Oct. 5, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [26]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

Bill of Exceptions, etc.

BE IT REMEMBERED, that on the 27th day of August, 1919, at a stated term of the District Court of the United States in and for the Southern Division of the Northern District of California, the above-entitled case came on regularly for trial, before the Honorable WM. C. VAN FLEET, District Judge presiding, the court sitting without a jury, a jury having been duly waived in writing by the parties, and said written waiver filed with the clerk of said court; plaintiff being represented by William H. Bryan and J. C. Webster, and defendant being represented by William E. Billings, and the following proceedings had:

Mr. McGinn, called as a witness on behalf of plaintiff, was duly sworn, and testified as follows: "I am a creditor of Charles F. Willey, a bankrupt. In the year 1911, I claimed a one-sixth interest in the Treasure Gold Mine, in Mariposa County. The mine stood in the name of Charles F. Willey. Charles F. Willey had made a sale of the mine

and payments on account had been made to him in 1911. I demanded of Charles F. Willey that he pay over to me the moneys owing to me for my one-sixth interest. He refused [27] to pay it over, and denied my ownership. I then got an attorney and commenced suit against him in Mariposa County to recover the moneys already paid to him and to determine my ownership. I obtained a judgment against Charles F. Willey, which was entered in May, 1912, for $1,040.00, moneys paid by the purchaser of the mine to Charles F. Willey up to the time of the trial, for my one-sixth share and adjudging that I was the owner of a one-sixth interest in the mine."

It was here stipulated as follows:

The action above referred to—Edward McGinn vs. Charles F. Willey, was filed December 9, 1911; the trial had on February 8, 1912, in the Superior Court of Mariposa County, California; judgment was entered on May 3, 1912; a notice of intention to move for new trial filed May 22, 1912, which motion was denied on May 28, 1912. An execution was issued on the judgment and levied on an automobile as the property of Charles F. Willey, in 1913, by William Sweeney, sheriff of Tuolumne County, California; that said sheriff sold the automobile and the proceeds of same were $437.50, which was applied upon the judgment. E. T. Willey, defendant herein, claiming the automobile as his own, sued the sheriff for conversion in the action, Willey vs. Sweeney, Superior Court, Tuolumne County, California, and that action was tried

on March 14, 1914, and resulted in a verdict against the sheriff. A motion for new trial was made and subsequently granted by the Court and the action was not further prosecuted.

Mr. McGinn, continuing: "At a meeting of the creditors of Charles F. Willey, in April, 1915, at which a trustee was elected, was the first time I ascertained any facts with reference to the transfer by Charles F. Willey of any money to his brother. I learned then that he had turned some money over [28] to his brother, and that his brother claimed the money. I was present at the trial in the action of E. T. Willey against Sweeney."

There was then offered and received in evidence all the records in the bankruptcy proceeding, No. 8788, in the matter of Charles F. Willey, bankrupt, In the United States District Court, Northern District of California.

It was stipulated that the substance of the records in the bankruptcy proceeding pertinent to this case were as follows:

Petition filed June 20, 1914;

Ordered Charles F. Willey adjudged bankrupt June 26, 1914;

First meeting of the creditors held at Sonora, California, April 13, 1915, and John C. Davis appointed trustee, and duly qualified as trustee on April 7, 1915. Edward McGinn filed on April 3, 1915, his claim based upon his judgment against the bankrupt, in due form. The substance of his claim is as follows:

Judgment for $1,040.27, on which $437.50 was

credited, and that subsequent to the trial of the action resulting in said judgment, and prior to the entry of the judgment, there was paid to Charles F. Willey, on account of the one-sixth interest in the Treasure Mine adjudged to be the property of Edward McGinn, the further sum of $457.73, which was subject to the judgment and which was retained by the bankrupt.

Bankrupt's petition for discharge filed May 20, 1915;

Objections of Edward McGinn thereto filed June 18, 1915;

Said objections referred to referee for hearing on June 19, 1915;

Hearing on said objections had before Referee Feb. 2, 1916;

Report of Referee on said objections and application for discharge returned May 16, 1917.

Petition for discharge denied May 22, 1917. [29]

Testimony of W. E. Burden, for Plaintiff.

W. E. BURDEN, called as a witness for the plaintiff, was duly sworn, and testified as follows:

"In the year 1912, I was Assistant Cashier of the First National Bank of Sonora, California. Charles F. Willey, at the time had an account in our bank. I am familiar from the records of the bank with any and all transactions in regard to his account. On February 27, 1912, C. F. Willey closed a savings account in which he had $840.38 and we accounted for two collections we had for his account, one from the Stockton Savings and Loan Society for

(Testimony of W. E. Burden.)

$1252.02, and one from the Hibernia Savings & Loan Society for $1,294.97, a total of $3,387.37; and at that time we issued a certificate of deposit in the name of C. A. Belli, cashier of the bank. E. T. Willey had a personal account at the bank during February, 1912. The next transaction with reference to the account established by C. F. Willey in the name of C. A. Belli, Cashier, was on March 13, 1912, when the certificate for $3,387.37 was cancelled and a new certificate in the same form for $100 less, was issued to C. A. Belli, Cashier. The $100 difference was a cash transaction. The next transaction appears on May 28, 1912, when the certificate for $3,287.37 was cancelled and a savings account was opened in the name of E. T. Willey with $1,500 deposit, and also a commercial account in the name of E. T. Willey 'special' for $1,787.37.''

The witness then identified and there was offered and received in evidence and read into the record two certificates of deposit in substance as follows:

Certificate of Deposit No. 3159, dated February 26, 1912, to E. T. Willey, deposited in this bank $3,387.37, payable to C. A. Belli, signed by the assistant cashier.

Certificate of deposit No. 3191, dated March 13, 1912, E. T. Willey has deposited in this bank $3,287.37, payable to C. A. Belli. [30]

The witness continuing: ''The Savings account was paid out about a year and a half following. I could not find the exact date, but I found a memorandum of the check of withdrawal, which showed

(Testimony of W. E. Burden.)

that $1,565.07 was withdrawn on October 25, 1913. The amount above $1500 was accumulated interest. That closed the savings account."

Testimony of J. H. Knowles, for Plaintiff.

J. H. KNOWLES, called as a witness for the plaintiff, was duly sworn, and testified as follows:

"In the year 1912, I was assistant cashier of the First National Bank of Sonora. The certificates of deposit heretofore referred to in the testimony of Mr. Burden are in my own handwriting. The transaction involving the deposits referred to in these certificates was handled by me and by C. F. Willey, Mr. C. F. Willey came into the bank and as I had known the family for a good many years he naturally came to me to wait on him, .and he brought in various accounts and wished to deposit them to his account—two savings account banks, one from Stockton and one from San Francisco, and wanted them all put into one account. He motioned for me to come and wait on him and said that he wanted to put them into an account that could not be attached—in a shape that they could not be attached. I do not recall that C. F. Willey said anything about any litigation pending against him. He just simply said he wanted these funds put in shape so that they could not be attached. I would say from this certificate of deposit that that conversation took place on February 26, 1912. We often have requests coming to us to put moneys in shape

(Testimony of J. H. Knowles.)

so they cannot be attached, and we have this way of doing it. A certificate of deposit is not payable without the certificate itself being presented, but is payable only to the individual who is named in the certificate, or his endorsee, and so it could not be garnished without this certificate of deposit. The method of doing it was [31] at the suggestion of the bank. The second certificate was also made in the same manner. The bank's record shows that C. F. Willey cashed that certificate of deposit and put $1787.37 in a special account, E. T. Willey's account. I believe E. T. Willey had another account in the bank, and to keep this separate I believe we called one a 'special' account that it might not be confused with the other."

On cross-examination, Mr. Knowles testified:

"I talked to Mr. McGinn, or his attorney, about these accounts after the whole thing was over, but not at the time of the suit concerning the levy on the automobile. At some time during the last five years I have talked with both sides about these accounts, but I could not fix dates."

On redirect examination, Mr Knowles testified:

"I recall being called before the referee in bankruptcy at a hearing in Sonora, California, in April, 1915. I testified in regard to these transactions at the hearing before the referee. I do not recall having talked with the attorneys of the parties at any time before that."

Testimony of E. T. Willey, for Plaintiff.

E. T. WILLEY, called as a witness for the plaintiff, was duly sworn, and testified as follows:

"I am the defendant in this action, and I am a brother of Charles F. Willey, the bankrupt named here. In February, 1912, I had an account in the First National Bank of Sonora, and I had a savings account there in June, 1912. I had a special account and a $1500 savings account in May and June, 1912. The $1500 account was not my money, but it was standing in my name. I am the E. T. Willey to whom the various accounts as was testified were transferred. I believe the amount of those was $3,287.37. At the time they were transferred to me I do not think [32] I gave my brother any consideration for them. I knew he was then engaged in litigation with Edward McGinn, and that the action for the mining claim had been tried before the court at the time the transfer was made to me. I think the judgment was rendered after the account was actually transferred to me; I don't remember."

Testimony of J. C. Webster, for Plaintiff.

J. C. WEBSTER, called as a witness on behalf of the plaintiff, was duly sworn, and testified as follows:

"I am one of the attorneys for John C. Davis, trustee in bankruptcy of Charles F. Willey, and also attorney for the creditors. I was attorney for Mr. McGinn in the suit of McGinn v. Willey, and

(Testimony of J. C. Webster.)

caused execution to issue against the property of Charles F. Willey. I made diligent search for property of Charles F. Willey. No money or property has come into the hands of the trutsee in bankruptcy, except a little vacant lot which has a nominal value not to exceed $20.00.''

On cross-examination, Mr. Webster testified:

''I took no supplemental proceedings against Willey to recover the property after the money realized from the sale of the automobile had been applied on the judgment in McGinn v. Willey because Willey had filed his petition in bankruptcy, which tied the hands of the State court.''

Testimony of W. E. Burden, for Defendant.

W. E. BURDEN, called as a witness for the defendant, testified as follows:

''I was a witness at the trial of Willey v. Sweeney, the sheriff, but I have no independent recollection of what occurred at that time.''

The transcript of the testimony taken at the trial of Willey v. Sweeney, sheriff, was offered and received in evidence and marked Defendant's Exhibit ''A.'' [33]

Mr. Billings read therefrom a portion of the testimony of W. E. Burden, as follows:

> Mr. WEBSTER.—''Q. Have you any record of the First National Bank of Sonora of an account which was in the First National Bank of Sonora in the year 1912, under the name of E. T. Willey, special? A. Yes, I have. Q. I would like, if you would refer to your record

(Testimony of W. E. Burden.)

and testify, if you can, when that account was created, and when and in what manner that was closed, if at all? A. The account of E. T. Willey, special, was created, May 28th, 1912, and closed by one check in June, 1912, and another in September, 1912.

Mr. WEBSTER.—What was the amount of the special account at the time it was created? A. $1787.37. Q. Now have you any record of how that special account was created? A. Why, by a transfer—

Mr. HAMPTON.—We object to that as immaterial, irrelevant and incompetent for any purpose in this case.

The COURT.—If it has any bearing on this transaction they are entitled to it. It might go more to its weight than to its admissibility. Answer it. A. It was created by a certificate of deposit in the name of C. A. Belli.

Mr. WEBSTER.—Have you the record as to what that certificate of deposit was given for? A. It was a transfer of funds from the account of C. F. Willey.

Mr. WEBSTER.—Transfer of funds from the account of C. F. Willey, and when was that transfer made? A. Why, in February, 1912." [34]

Testimony of E. T. Willey, for Defendant.

E. T. WILLEY, called as a witness for defendant, testified as follows:

"I was not present when the transfers of money

(Testimony of E. T. Willey.)

were made from the account of Belli to myself in the First National Bank of Sonora. I knew nothing about them. I was told afterwards by Mrs. C. F. Willey that the special account of $1787 had been transferred to me; that transfer was made to me because $1090 of that amount I had loaned to my brother, C. F. Willey, at different times. The other $700 was fire insurance belonging to my mother. I drew a check for about $800 on this money to buy an automobile. It was the automobile that was the subject of my suit against the sheriff. The rest of the money I left in the care of Mrs. C. F. Willey for my mother. I knew nothing about the $1500 savings account until some time afterwards. It was transferred to my name without my knowledge of consent. I gave the $1500 to Mrs. C. F. Willey; I don't know what became of it after it left my hands. Mrs. Willey asked me to get it for her. I didn't know about it before that time. She just said she wanted the money and would like me to draw it up there, and she told me then about its being there. I was present at the trial of Willey v. Sweeney, sheriff. Mr. McGinn was present during that trial. I heard the testimony of Mr. Burden at that trial. Mr. McGinn was there at that time."

On cross-examination, E. T. Willey testified:

"At the time of the transfer I knew nothing about the transfer of these moneys from my brother's account to me. I do not remember just when I learned they had been transferred to my

(Testimony of E. T. Willey.)

account. I knew it prior to the time that I turned these moneys over to my brother's wife, and prior to the purchase of the automobile. When I learned that there had been $1787 deposited in my name in a special account, I think it was explained to me by Charles F. Willey how that money came to me, but I do not think [35] the $1500 savings account was mentioned. I learned about the savings account, I think, from Mrs. C. F. Willey. They told me why this special account was placed in my name. I don't remember that I testified at the trial of Willey v. Sweeney, sheriff, that the moneys that made up this $1787 special account were moneys that I had earned, and were not moneys that had been transferred from my brother's account to my account in the bank."

Mr. Webster here showed the witness transcript of his testimony taken at the trial of Willey v. Sweeney:

Q. "Mr. Willey, by refreshing your memory, did you so testify in that case?"

"A. I guess I must have."

The COURT.—"Now what was that testimony?"

Mr. WEBSTER.—"The testimony is as follows: (Reading.)

"Q. And you stated you paid for it with the check introduced in evidence in this case? A. Yes, sir. That is the check that purchased the automobile.

Q. Now you have drawn this check; under your name is marked—written, 'special account,' against which this check was drawn. A. That is money I had in the bank to pay for this machine.

"Q. You put that money in the bank for the purpose of purchasing this machine, did you? A. Yes, sir.

"Q. You stated, Mr. Willey, that this check was drawn on the special account? A. Yes, sir.

"Q. That was placed with the bank for the purpose of buying this automobile? A. And for the benefit of my mother in case anything happened to me; there was more than enough to pay for the price of the machine.

"Q. And when was that money placed in the bank? A. I don't remember just when I did put it there. [36]

"Q. Shortly before the machine was purchased and the check drawn? A. Some little time before, I think.

"Q. Well, have you any more definite knowledge? A. I could not give the date, no.

"Q. To refresh your memory, was it along the latter part of 1911? A. It might have been in 1911, some time; I could not say.

"Q. And where did you get this money that was deposited in the bank to that special account? A. It was money I had saved up from working.

"Q. And had you had it on deposit in some other account prior to that time? A. I had another small account, in a commercial account.

"Q. Did you draw out of this account and put it in the special account? A. No.

"Q. Then this was money you deposited at this time, not drawn out of any other account? A. No, sir.

"Q. Where did you have the money before you put it in the bank? A. I had it at home.

"Q. At home? A. Yes, sir.

"Q. Where? A. At Stent.

"Q. In Stent? A. Yes, sir.

"Q. And how much? A. Well, I can't give you the exact amount.

"Q. Now, as a matter of fact, Mr. Willey, was not this money that was deposited in the special account, money that was delivered to you, given to you or transferred to you in some way by your brother, C. F. Willey? A. No, sir.

"Q. You had no money of your own—had you any money of your own when you returned to Tuolumne County, from Nevada? A. Did I have any? [37]

"Q. Yes. A. I had.

"Q. How much money did you have at that time? A. I don't recollect what I did have."

Q. That was your testimony given at that time, was it, Mr. Willey? A. Yes.

E. T. WILLEY resumes: "This special account

(Testimony of E. T. Willey.)

referred to in the testimony given in the case of Willey vs. Sweeney is the same special account on which the check for the automobile was drawn. It was the only special account in my name of moneys transferred from my brother's account. There was a consideration for that transfer. I had loaned my brother $1,090.00. I think it was during the year 1910. I supposed my brother had some money. I did not know where he had it on deposit. I don't remember the dates on which I loaned him the money."

The COURT.—"What was the purpose of the loan?

A. I don't know what he wanted to use it for.

Q. Did he give you a note?

A. No, I did not ask for any.

Q. How did you pay him the money, by check?

A. No, I gave him cash.

Q. Where did you have the $1,090 in cash?

A. I gave it to him at different times.

Q. Where did you have that amount of money in 1910 in cash?

A. I had some at my home and some of it with me.

Q. Some at home and some with you is a very indefinite statement. A man does not carry around $300 or $400 or $500 in his breeches pocket, or a thousand dollars. Can't you tell us more definitely than that?

A. I never put much money in the bank. I always kept it in the house.

(Testimony of E. T. Willey.)

Mr. WEBSTER.—Q. Now, was your brother paying interest on this loan? A. No. [38]

Q. Was there any note or memorandum of any kind in his handwriting in reference to this loan that you speak of? A. No.

Q. No promissory note to repay it? A. No.

Q. No receipt of any kind passed between you?

A. I don't think that he told me what he wanted it for. He may have at the time. If he did I have forgotten.

Q. Were you in the habit of loaning money so frequently that you did not pay any attention to what the circumstances were under which you loaned it? A. Well, I never asked him any questions."

Witness resumes, responding to Mr. Webster's questions:

"My brother paid over to me the $700 which was to go to my mother on insurance money at the same time he paid me the balance. The money was left with Mrs. Charles Willey to give to my mother. She gave it to my mother as she needed it to help in her support and maintenance. My mother lived alone in a house a short distance from Charles F. Willey's house in Stent. I was living at Black Oak fifteen or twenty miles away at the time. I don't know how much of this money Charles F. Willey has spent towards the maintenane of my mother. He says it is all gone.

The COURT.—Do you know anything about it? Have you handled any of it?

A. I have not handled it.

(Testimony of E. T. Willey.)

Q. You do not know whether they have ever paid a dollar over to your mother?

A. She told me that they did.

Mr. WEBSTER.—Q. This loan of $1,090 you testified to was not made in one loan? A. No.

Q. How many different loans went to make up this $1,090? A. Three, I believe.

Q. When was the first loan made, about?

A. About 1910.

Q. What was the amount of it?

A. I think about $400. [39]

Q. When was the second made?

A. I don't remember the date of any of these.

Q. What was the amount of the second loan?

A. $350; it was either $350 or $340; I don't remember which.

Q. You don't remember exactly what it was?

A. No.

Q. When was the third loan?

A. There may have been one loan I made early in 1911; I am not sure about that.

The COURT.—What were you doing at that time?

A. I think I was working at the Black Oak Mine.

Q. In what capacity? A. Blacksmith.

Q. What were your earnings? A. $4 a day.

Q. How long had you been earning that?

A. I don't remember; I worked there eight years altogether.

Q. How long since had you been back from Nevada?

(Testimony of E. T. Willey.)

A. I think it was 1907 when I came back from Nevada.

Q. You had carried this amount of money around in your pocket, or kept it at the house, this money that you loaned your mother?

A. I kept most of it at my home.

Q. Where did you live? A. Stent.

Q. Alone?

A. With my mother when I was at home.

Q. You lived with your mother when you were at home? A. Yes.

Q. Did you say nothing to your brother as to the purpose for which he wanted this money when he said he wanted it as a loan?

A. I think there was something said, but I don't remember what it was.

Q. You were not a financier who was able to make so many loans that you did not pay attention to what the circumstances for a particular loan were?

A. He must have told me, but I don't remember.

Q. Don't you remember?

A. I don't remember what it was now. [40]

Q. You see, I am asking these questions—of course, I have got to pass on this evidence; the truth of the statements must be tested by the usual and ordinary methods that men pursue in their dealings with one another. It is a perfectly legitimate ground for disbelieving a man if his testimony involves a state of circumstances which do not accord with the way men usually do things. That is why I am asking you.

(Testimony of E. T. Willey.)

A. I think he told me at the time what he wanted it for, but I am not sure.

Q. You knew at the time that your brother was a man of some means and had some money in the bank, did you not?

A. I knew he had some money.

Q. Why didn't you say to him, Why don't you take some of your savings money and do whatever it is that you want to do with this money? Didn't it strike you as rather a singular thing that your brother, with a savings account or two, where he was getting interest on his money, would come to you and ask you to loan him money without offering to give you any note or stipulation to pay you any interest? Do you think that that looks reasonable?

A. I know it does not. I did not ask him for interest."

There was here offered and received in evidence on behalf of the defendant, the record in action Number 341, in Equity, entitled John C. Davis, trustee, vs. E. T. Willey et al., in the District Court of the United States, Southern Division of Northern District of California, and marked Defendant's Exhibit "B."

Thereupon the action was submitted to said court for decision, and thereafter, on the 20th day of February, 1920, the court found in favor of defendant, and made and filed its Findings of Fact and Decision herein.

Defendant specifies the following particular in which the evidence is insufficient to support the Find-

ings, Decision and [41] judgment of the court, viz.:

The evidence is insufficient to support Finding V to the effect that such disclosure was made at the trial of the action of E. T. Willey against Sweeney, the sheriff, in March, 1914, of any transfer of any moneys by Charles F. Willey to E. T. Willey, such as to put the said McGinn and this plaintiff upon inquiry as to the fraud in the said transfer and to show that investigation would then have exposed to Edward McGinn and J. C. Webster the entire transaction in the complaint set forth in the present action.

The evidence is insufficient to support Finding VI to the effect that the judgment or decree dismissing as to defendant, E. T. Willey, the suit in Equity in the District Court of the United States, for the Northern District of California, against E. T. Willey and Mrs. Charles F. Willey, Number 341, constituted a bar to the present action.

The evidence and findings are insufficient to support the Conclusion of Law that the present action is barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California, and that the present action is barred by the order or decree dismissing as to defendant, E. T. Willey, the said suit numbered 341 In Equity, in this court.

That since the said decision and judgment in favor of defendant, as aforesaid, said District Court, from time to time, by orders duly made, has granted to said plaintiff extensions of time to and including August 15, 1920, in which to prepare, serve and file

his bill of exceptions to be used upon any writ of error hereafter to be allowed; the said orders being signed by said court and filed herein in the office of the clerk of said court.

The foregoing constitutes all of the proceedings had, and all testimony offered and received on the trial of said cause [42] and now within the time required by law and the rules of this court, said plaintiff, John C. Davis, trustee of the estate of Charles F. Willey, in bankruptcy, proposes the foregoing as and for the Engrossed Bill of Exceptions as aforesaid, and prays that the same may be settled and allowed as correct.

J. C. WEBSTER,
WILLIAM H. BRYAN,
Attorneys for Plaintiff. [43]

Stipulation Re Bill of Exceptions.

It is hereby stipulated that the foregoing Bill of Exceptions is correct; that it contains all of the testimony offered and received and all the proceedings had on the trial of said cause.

Dated August 2d, 1920.

J. C. WEBSTER,
WILLIAM H. BRYAN,
Attorneys for Plaintiff.
WILLIAM E. BILLINGS,
Attorney for Defendant.

Order Certifying and Allowing Bill of Exceptions.

The foregoing Bill of Exceptions now being

presented in due time and found to be correct, I do hereby certify that said bill contains all of the testimony offered and received, and all of the proceedings had on the trial of said cause.

Dated August 5th, 1920.

WM. C. VAN FLEET,

Judge of the United States District Court, for the Northern District of California, Second Division.

Service of the within proposed Bill of Exceptions and Engrossed Bill of Exceptions, and receipt of a copy is hereby admitted this 31st day of July, 1920.

WILLIAM E. BILLINGS,

Attorney for Defendant. [44]

[Endorsed]: Filed Aug. 5, 1920. W. B. Maling, Clerk. By. J. A. Schaertzer, Deputy Clerk. [45]

Defendant's Exhibit "B."

In the District Court of the United States, in and for the Northern District of California.

IN EQUITY.—No. 341.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY in Bankruptcy,

Plaintiff,

vs.

E. T. WILLEY and MRS. CHARLES F. WILLEY,

Defendants.

COMPLAINT TO SET ASIDE TRANSFER.

To the Judges of the District Court of the United States, in and for the Northern District of California:

John C. Davis, a citizen of the State of California, residing in Tuolumne County in said State, Trustee of the Estate of Charles F. Willey in Bankruptcy, brings this, his bill, against E. T. Willey and Mrs. Charles F. Willey, citizens of the State of California and residing in Tuolumne County in said State. And therefore plaintiff complains and says:

I.

That on the 20th day of June, 1914, a petition was filed in the District Court of the United States in and for the Northern District of California, in bankruptcy, by Charles F. Willey, numbered 8788 in the bankruptcy files of said court, which petition prayed that said Willey be adjudged bankrupt, and thereafter on June 26th, 1914, said Charles F. Willey was by said court duly adjudicated a bankrupt.

That thereafter, on April 3, 1915, and at the first meeting of creditors called and held before Fred A. Copestake, Referee in Bankruptcy, to whom said matter in bankruptcy had been referred by said court, plaintiff above named was duly appointed Trustee in Bankruptcy of the Estate of said Bankrupt, and [46] thereafter plaintiff qualified as such trustee, and and ever since has been and now is the duly appointed, qualified and acting Trustee in Bankruptcy of the Estate of said Bankrupt.

II.

That Edward McGinn is the sole creditor of said

bankrupt; that the claim of said creditor consists of a judgment of the Superior Court of the State of California, in and for the County of Mariposa in favor of said Edward McGinn and against said bankrupt, rendered by said court on or about May 3, 1912, for the sum of $1,040.27 and costs. That proof of the said claim was duly made in the said bankruptcy proceeding, and a certified copy of the said judgment filed therewith.

That at all times from July 1st, 1907, until the aforesaid judgment was given and made, Edward McGinn was the equitable owner of a one-sixth interest in a mining property in Mariposa County, California, the legal title to which said interest was held by said bankrupt, Charles F. Willey, in trust for Edward McGinn. That in the year, 1909, the said bankrupt entered into a contract for the sale of said property so held in trust, and by virtue of said contract and prior to the commencement of the action which resulted in the aforesaid judgment, said bankrupt received certain moneys on account of the purchase price of the said property, but failed and refused to account to the said Edward McGinn for the said moneys and to pay over the same to him; and that thereafter, on September 30th, 1911, the said Edward McGinn brought the said action against the said bankrupt in the aforesaid Superior Court to recover the said moneys; that said bankrupt after receiving the aforesaid moneys on the purchase price of the said property, as aforesaid, and pending the aforesaid suit, transferred and paid over to defendants above named all the moneys received as afore-

said from the sale of the said interest of Edward [47] McGinn together with other moneys of said bankrupt amounting altogether to the sum of $3,-300.00, or thereabouts, so transferred. That said transfer was made without consideration and with the intent and for the purpose of defrauding said Edward McGinn out of the moneys due him as aforesaid. That said transfer was made to said defendants with said intent and for said purpose with the full knowledge of said defendants and each of them and with their consent and the consent of each of them.

III.

That said bankrupt appealed to the District Court of Appeal of the Third Appellate District of the State of California from the said judgment rendered May 3d, 1912, and said appeal was determined and the said judgment affirmed by the said District Court of Appeal on April 8th, 1914; and a petition by said bankrupt for a hearing of the same matter by the Supreme Court of said State was denied by said Supreme Court on June 6th, 1914, and the remittitur in said matter was made to the aforesaid Superior Court on June 8th, 1914, and that said bankrupt thereupon, on June 20th, 1914, filed his petition for voluntary bankruptcy, and named in the schedule accompanying said petition Edward McGinn as sole creditor and said judgment as the sole debt from which discharge was sought.

IV.

That plaintiff herein at the first meeting of the creditors of said bankrupt on April 3d, 1915, first

learned that said bankrupt had transferred certain moneys to defendants. That before plaintiff had made any further investigation as to the facts of said transfer, and on May 20th, 1915, the said bankrupt applied to the aforesaid District Court for a discharge in bankruptcy. That upon the hearing of said application and the [48] objections of Edward McGinn thereto, said court on June 19th, 1915, referred the matter back to the Referee in bankruptcy for hearing upon the objections. That said hearing was had before Fred A. Copestake, Referee in Bankruptcy, in Stockton, California, on February 2d, 1916. That defendants above named were examined before the Referee at said hearing, and plaintiff first learned from the said examination the facts relative to the transfer of the said moneys as hereinbefore alleged.

V.

That plaintiff as such Trustee in Bankruptcy has insufficient assets with which to pay in full the debts of said bankrupt, but on the contrary the assets of said Estate will be insufficient to pay any part whatever of the aforesaid claim as filed and allowed in said bankruptcy proceeding.

VI.

That plaintiff has made demand upon defendants, and each of them, that they, and each of them pay over to him as such trustee the moneys transferred as aforesaid, and the said defendants, and each of them, refused and still refuse to pay over to him said moneys, or any part thereof.

And plaintiff prays that upon final hearing of this

cause that it be ordered and decreed that the moneys were transferred by said bankrupt to said defendants and received by them in fraud of the creditors of said bankrupt, and that the amount so transferred be determined and that defendants pay over the same to plaintiff as trustee as aforesaid, together with interest thereon and for such other general relief as may by the court be deemed just and equitable.

J. C. WEBSTER,
WILLIAM H. BRYAN,
Solicitors for Plaintiff.

[Endorsed]: Filed Mar. 14, 1917. W. B. Maling, Clerk. By J. A. Schaertzer Deputy Clerk. [49]

UNITED STATES OF AMERICA.

In the Southern Division of the United States District Court, Northern District of California, Second Division.

IN EQUITY.

SUBPOENA.

The President of the United States of America, GREETING: To E. T. Willey and Mrs. Charles F. Willey.

You are Hereby Commanded, That you be and appear in the Southern Division of the United States District Court for the Northern District of California, Second Division, aforesaid, at the Courtroom in the City of San Francisco, twenty days from the date hereof, to answer a Bill of Complaint exhibited against you in said court by John

C. Davis, Trustee of the Estate of Charles F. Willey in Bankruptcy, who is a citizen of the State of California, and to do and receive what the said Court shall have considered in that behalf.

Witness, the Honorable WILLIAM C. VAN FLEET, Judge of said District Court, this 14th day of March, in the year of our Lord one thousand nine hundred and seventeen, and of our Independence the 141st.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

Memorandum Pursuant to Rule 12, Rules of Practice for the Courts of Equity of the United States.

You are hereby required to file your answer or other defense in the above suit, on or before the twentieth day after service, excluding the day thereof, of this subpoena, at the Clerk's Office of said Court, pursuant to said Bill; otherwise the said Bill may be taken *pro confesso*.

WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk. [50]

State of California,
County of Tuolumne,—ss.

William Sweeney, being first duly sworn, deposes and says: That he is and was at the time of the service of the within subpoena, a citizen of the United States and the State of California, and a resi-

dent of the county of Tuolumne, over the age of twenty-one years, and not a party to the above-entitled action; that he served the within subpoena, by showing the said within original to each of the following persons named therein, and delivering a true copy thereof to each of the said persons, personally, on the 29th day of March, 1917, in the county of Tuolumne, State of California.

WILLIAM SWEENEY.

Subscribed and sworn to before me this 31st day of March, 1917.

[Seal] J. C. WEBSTER,
Notary Public.

[Endorsed]: Filed Apr. 9, 1917. W. B. Maling Clerk. By J. A. Schaertzer, Deputy Clerk.

In the District Court of the United States, in and for the Northern District of California.

IN EQUITY—No. 341.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff,

vs.

E. T. WILLEY and Mrs. CHARLES F. WILLEY,
Defendants.

SEPARATE ANSWER OF E. T. WILLEY.

Comes now the defendant E. T. Willey above named, and answering plaintiff's complaint on file

herein, denies, alleges and admits as follows:

Admits Paragraph I of said complaint.

Answering defendant alleges that he has no knowledge, information or belief concerning the allegations contained in the first twenty-two lines of Paragraph II of said complaint, and basing his denial upon that ground denies the same.

Answering the rest of said Paragraph II of said complaint, said answering defendant denies that said bankrupt, after receiving the said moneys on the purchase price of the said property, as aforesaid, and pending the aforesaid suit, transferred and paid over to answering defendant all, or any part, of the moneys received, as aforesaid, from the sale of said, or any, interest of Edward McGinn, together with other moneys of said bankrupt, amounting altogether to the sum of $3300.00, or any other sum.

Denies that said, or any, transfer was made without consideration and with the intent and for the purpose of defrauding [51] said Edward McGinn out of the moneys due him, as aforesaid, or otherwise.

Denies that said transfer was made to said answering defendant with said intent and for said purpose with the full, or any, knowledge of said answering defendant, or with his consent, and in this connection answering defendant alleges that sometime in March, 1912, the exact date of which is now unknown to said answering defendant, said Charles F. Willey paid back certain moneys that he had previously borrowed from answering defendant, but

that none of the moneys so paid by said Charles F. Willey to said answering defendant were the moneys received by Charles F. Willey for said one-sixth interest in said, or any, mining claim, and that all of said moneys so paid by said Charles F. Willey to said answering defendant were lawfully paid in settlement of legal obligations owing from said Charles F. Willey to said answering defendant.

Answering Paragraph III of said complaint, said answering defendant avers that he has no knowledge, information or belief concerning the allegations contained therein, and therefore denies the same.

Answering Paragraph IV of said complaint, said answering defendant alleges that he has no information, knowledge or belief concerning the allegations therein contained, and therefore denies the same, except he admits that he was examined before the referee at said hearing.

Answering Paragraph V of said complaint, said answering defendant alleges that he has no information, knowledge or belief sufficient to answer the same and therefore denies the same.

Admits Paragraph VI.

And as a further, separate and distinct defense to said complaint, said answering defendant avers that the said [52] complaint does not state facts sufficient to entitle the said plaintiff to the equitable relief demanded therein, but on the contrary it appears on the face thereof that said plaintiff has an adequate legal remedy against said answering defendant, if he has any remedy at all.

As a further, separate and distinct defense against said complaint, answering defendant alleges that more than six years have elapsed since the alleged fraudulent transfer set out in Paragraph IV of said complaint, and that all rights of the said plaintiff against said answering defendant on account thereof are barred by laches.

WHEREFORE, said answering defendant prays that he may be hence dismissed with his costs.

J. P. O'BRIEN,

Attorney for Answering Defendant, E. T. Willey.

Due service of the within admitted by copy this 15th day of May, 1917.

J. C. WEBSTER,
WILLIAM H. BRYAN,
Attorneys for Plaintiff.

[Endorsed]: Filed May 15, 1917. Walter B. Maling, Clerk. [53]

In the District Court of the United States, in and for the Northern District of California.

IN EQUITY—No. 341.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff,

vs.

E. T. WILLEY and MRS. CHARLES F. WILLEY,
Defendants.

SEPARATE ANSWER OF MRS. CHARLES E. WILLEY.

Now comes Mrs. Charles F. Willey, and answering the complaint on file herein, denies, alleges and admits as follows:

Admits Paragraph I of said complaint.

Answering Paragraph II of said complaint, said answering defendant avers that she has no knowledge, information or belief sufficient to enable her to answer the allegations contained in the first twenty-two lines of said paragraph, and basing her denial upon that ground, denies the same.

Answering the rest of said Paragraph II, said answering defendant denies that said bankrupt, after receiving the aforesaid moneys on the purchase price of said property, as aforesaid, and pending the aforesaid suit, transferred and paid over to answering defendant any of the moneys received, as aforesaid, from the sale of said interest of Edward McGinn, or any other moneys of said bankrupt, amounting altogether to the sum of $3300.00, or any other sum, in excess of the sum of $1500,00, and as to the transfer of said $1500.00, said answering defendant alleges that said money, and the whole thereof, was transferred to her for a good and valuable consideration, [54] and was used by her in the support of her children.

Said answering defendant denies that said tranfer was made without consideration and with the intent or for the purpose of defrauding said Edward McGinn out of the moneys due him, as aforesaid, or otherwise. Denies that said transfer was

made to said answering defendant with any intent or purpose of defrauding the said Edward McGinn out of the moneys due him, as aforesaid, and denies that said transfer was made, as aforesaid, with full or any knowledge of said answering defendant, or with the consent of said answering defendant, of defrauding said Edward McGinn out of the, or any, moneys due him, as aforesaid.

Answering Paragraph III of said complaint, said answering defendant avers that she has no knowledge, information or belief respecting the allegations therein contained, and basing her denial upon that ground, denies the same.

Answering Paragraph IV of said complaint, said answering defendant avers that she has no knowledge, information or belief of the allegations therein contained, and basing her denial upon that ground, denies the same, except that she admits that she was examined before the Referee at said hearing.

Answering Paragraph V of said complaint, said answering defendant avers that she has no knowledge, information or belief sufficient to enable her to answer said allegations, and basing her denial upon that ground denies the same.

Admits Paragraph VI of said complaint.

And as a further, separate and distinct defense to said complaint, said answering defendant avers that the said complaint does not state facts sufficient to entitle the said plaintiff to the equitable relief demanded therein, but on the contrary, it appears on the fact thereof that said plaintiff has

an adequate legal remedy against said answering defendant, if [55] he has any remedy at all.

As a further, separate and distinct defense against said complaint, answering defendant alleges that more than six years have elapsed since the alleged fraudulent transfer set out in Paragraph IV of said complaint, and that all rights of the said plaintiff against said answering defendant on account thereof are barred by laches.

WHEREFORE, said answering defendant prays that she may be hence dismissed with her costs.

J. P. O'BRIEN,

Attorney for Answering Defendant, Mrs. Charles F. Willey.

Service of the within admitted by copy this 15th day of May, 1917.

J. C. WEBSTER,
WILLIAM H. BRYAN,
Attorneys for Plaintiff.

[Endorsed]: Filed May 15, 1917. Walter B. Maling, Clerk. [56]

At a stated term, to wit, the November term, A. D. 1917, of the Southern Division of the United States District Court for the Northern District of California, Second Division, held at the Courtroom in the City and County of San Francisco, on Wednesday, the 16th day of January, in the year of our Lord one thousand nine hundred and eighteen. Present: The

Honorable JEREMIAH NETERER, District Judge for the Western District of Washington, designated to hold and holding this Court.

No. 341—EQUITY.

JOHN C. DAVIS, Trustee, etc.,

vs.

E. T. WILLEY and Mrs. CHARLES F. WILLEY.

MINUTES OF COURT—JANUARY 16, 1918—ORDER DISMISSING SUIT AND FOR ENTRY OF DECREE.

After argument by counsel the suit was submitted and being fully considered it was ordered that the defendant Mrs. Charles F. Willey pay to the plaintiff the sum of $1565.00 within 45 days, that this suit be and the same is hereby dismissed as to the defendant E. T. Willey, and that a decree be signed, filed and entered herein. accordingly. [57]

(Title of Court and Cause.)

ENROLLMENT.

The plaintiff filed his bill of complaint herein on the 14th day of March, 1917, which is hereto annexed.

A subpoena to appear and answer in said cause was thereupon issued, which is hereto annexed.

On the 15th day of May, 1917, the answer of E. T. Willey, was filed herein, which is hereto annexed.

On the 15th day of May, 1917, the Answer of Mrs. Charles F. Willey was filed herein, which is hereto annexed.

On the 16th day of January, 1918, an Order directing decree to be signed, filed and entered herein, was made and entered herein, a copy of which said order is hereto annexed.

Thereafter a Decree was signed, filed and entered herein in the words and figures as follows, viz.: [58]

In the District Court of the United States, in and for the Northern District of California.

IN EQUITY—No. 341.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff,

vs.

E. T. WILLEY and Mrs. CHARLES F. WILLEY,
Defendants.

DECREE.

At the November term of the District Court of the United States for the Northern District of California, held in the United States Courtroom at San Francisco, California, on the 7th day of November, in the year of our Lord one thousand nine hundred and seventeen, Present, Hon. JEREMIAH NETERER, District Judge.

This cause came on to be heard at the November

Term of the said court in the year of our Lord one thousand nine hundred and seventeen, and was called for trial on January 15, 1918, and partly tried on that date, and the trial continued over to the following day on which day the trial was completed, and on the conclusion of the trial the Court found that on June 26, 1914, Charles F. Willey was, by the above-entitled court, duly adjudicated a bankrupt; and that on April 3, 1915, plaintiff was duly appointed trustee in bankruptcy of the estate of said bankrupt, and thereafter qualified as such trustee, and ever since has been and now is the duly appointed, qualified and acting trustee in bankruptcy of the estate of said bankrupt, and the Court orally gave its decision as follows:

"I am thoroughly convinced that this matter never should have found its way into the bankruptcy court. I do not [59] believe that Mr. Willey was a bankrupt at the time that this petition was filed. I think I should say that at the time the petition in bankruptcy was filed he had different counsel than he has now.

"I think that we confuse in our discussion in this case the trust fund. This entire fund in issue is a trust fund placed in this court by the bankrupt himself, that is, such part of the fund, if any, that is part of this estate. I understand there is only one creditor. The trust fund contended for on behalf of the creditor is a fund which was derived from the sale of a certain mining claim, and I believe amounted to some $1,490. Now, the creditor's

right to pursue that fund and the trustee's right to pursue a fund placed in this court by bankruptcy proceedings do not bear the same relation. The trustee has a right to pursue the fund of the bankrupt estate wherever it may be found and have it adjudicated in a bankruptcy court unless perchance the rights of some other person might intervene, which will require the deliberation upon that issue by a jury. I think in this case the rights of the defendants E. T. Willey and. Mrs. Willey are not the same. E. T. Willey received from the funds of Mr. Willey about eight months prior to the time of his filing his petition in bankruptcy, if I remember right, $1,787. This was received by him, as testified to by him, by Mrs. Willey and by the bankrupt Mr. Willey in payment of advances made by him prior to that time to the bankrupt Willey. So that the payment of this creditor, if he was a creditor, made prior to the four months' period preceding adjudication, would not under the bankruptcy act be a fraudulent preference. It would be a payment which the bankrupt had a right to make.

"That indebtedness is a matter which could not be determined [60] in the original bankruptcy proceeding. It would have to be determined in a plenary action where Willey would have a right to have that issue passed upon by a jury. Under the testimony disclosed in this case it is established beyond any question that the defendant, E. T. Willey, has none of this

money; that while he received $1,787 he paid for an automobile something over $700, which was used by the bankrupt Willey and levied upon by the sheriff to satisfy a judgment which was secured by the creditor; and the remainder of the fund he paid to Mrs. Willey, and Mrs. Willey stated that she received it. Now, as to the amount paid to Mr. Willey and subsequently paid by him to Mrs. Willey I do not think this court is going to be concerned about. I do not know that I should comment upon the evidence.

"I find from an examination of the pleadings in this case that the total amount of the indebtedness of this estate is something over $1,000 reduced to judgment by the only creditor of this estate. The credit claim shows that 400 odd dollars has been paid on this judgment. From some suggestion made on examination of one of the witnesses this may not be a proper credit. I do not know whether it is, or not; that is not before the Court; so that it would be unnecessary for the court to determine with relation to the indebtedness due to E. T. Willey even though that was properly before the Court.

Mrs. Willey said she received $1,500 in addition to the other sums that E. T. Willey paid to her. I think the $1,500 should be returned and paid to the trustee. Mr. Willey testified that some of the money was used in improving the homestead. It is not necessary for the Court to determine that matter now; that is really not

before the Court. I am going to make an order [61] that Mrs. Willey pay to the trustee the $1,565 which she received, $1,500 of this money and $65 interest which was received from the bank. I think that she could pay that within 30 or 45 days. If she fails to do that then it will be incumbent upon the court to determine whether she has the money and can pay it upon an order to show cause why she should not be committed for contempt of court.

I think I should say now that I cannot see why these parties should not get together and dispose of this matter in the right way and amicably, and not require the court to dispose of it. This can be done a great deal better by the parties than it can be by the Court; and if the parties had done this before the bankruptcy proceeding was instituted it would have been a great deal better. I simply make that observation because I feel that I should do it."

It is therefore ordered, adjudged and decreed that the said defendant Mrs. Charles F. Willey within forty days from date hereof pay over to the said plaintiff John F. Davis, trustee of the estate of Charles F. Willey in Bankruptcy, the said sum of one thousand five hundred and sixty-five ($1565) dollars.

Dated: February 7th, 1918.

JEREMIAH NETERER,
District Judge.

[Endorsed]: Filed and entered February 11, 1918. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [62]

CERTIFICATE TO ENROLLMENT.

WHEREUPON, said pleadings, subpoena, copy of order and decree, are hereto annexed; said final decree being duly signed, filed and enrolled, pursuant to the practice of said District Court.

Attest my hand and the seal of said District Court this 11th day of February, 1918.

[Seal] WALTER B. MALING,
Clerk.
By J. A. Schaertzer,
Deputy Clerk.

[Endorsed]: Filed February 11th, 1918. Walter B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [63]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,
Plaintiff,

vs.

E. T. WILLEY,
Defendant.

Petition for Writ of Error.

John C. Davis, trustee of the estate of Charles F. Willey, in bankruptcy, plaintiff in the above-entitled action, feeling himself aggrieved by the decision of the court and the judgment entered

herein on the 20th day of February, 1920, comes now by Messrs. J. C. Webster and William H. Bryan, his attorneys, and petitions said court for an order allowing said plaintiff to prosecute a writ of error to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, under and according to the laws of the United States in that behalf made and provided; and also that an order be made fixing the amount of security which the said plaintiff shall give and furnish upon such writ of error, and that upon the giving of such security all further proceedings in this court be suspended and stayed until the determination of said writ of error by said United States Circuit Court of Appeals for the Ninth Circuit.

Dated August 2nd, 1920.

J. C. WEBSTER,
WILLIAM H. BRYAN,
Attorneys for said Plaintiff.

[Endorsed]: Filed Aug. 2, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [64]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

Assignment of Errors.

Comes now John C. Davis, trustee of the estate of Charles F. Willey, in Bankruptcy, plaintiff above named, and makes and files the following assignment of errors upon which he will rely upon the prosecution of his writ of error in the above-entitled cause;

1. The District Court above named for the Northern District of California, Second Division, erred in making its Conclusions of Law and entered judgment in favor of defendant and against plaintiff on the facts as found by the court;

2. The decision was contrary to and against law, because the court erred in making, giving, rendering and entering judgment in favor of defendant, and erred in failing to give, make, render and enter judgment in favor of plaintiff;

3. The Court erred in making its Conclusion of Law that the action was barred by the order or decree dismissing as to defendant, E. T. Willey, the suit of John C. Davis, Trustee, etc., vs. E. T. Willey and Mrs. Charles F. Willey, Number 341, in Equity, in the above-entitled court, and rendering and entering judgment for defendant thereon; because it appears from the undisputed evidence that the said order or decree dismissing E. T. Willey in action Number 341 does not constitute a bar to the present action. [65]

4. The Court erred in finding as a fact in Finding V that the disclosure at the trial of Willey vs. Sweeney, of a transfer on the bank records from

Charles F. Willey to E. T. Willey was such as to put Edward McGinn and this plaintiff, John C. Davis, upon inquiry as to the fraud as to said transfer and to show that an investigation would have exposed the entire transaction set forth in this action; and the Court erred in making its Conclusion of Law thereon that the action was barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California, and in rendering and entering judgment for defendant thereon, because it appears from the undisputed evidence that the proceedings and the testimony given at the trial of said case of Willey vs. Sweeney were insufficient to give such notice to this plaintiff as to put him upon inquiry as to the fraud set forth in this action, and to require him to make investigation therefor;

5. The Court erred in making its Conclusion of Law that the action was barred by the provisions of subdivision 4 of section 338 of the Code of Civil Procedure of the State of California, and in rendering and entering judgment for defendant thereon, because this action being an action by a trustee in bankruptcy, to recover property conveyed by the bankrupt in fraud of his creditors is not governed by the Statute of Limitations prescribed by the State of California, but by the Statute of Limitations prescribed by the Bankruptcy Act.

WHEREFORE, the said John C. Davis, Trustee, as aforesaid, plaintiff in error herein, prays that the judgment of the above-entitled court be reversed, and a new trial granted.

Dated, San Francisco, California, August 2d, 1920.

J. C. WEBSTER,
WILLIAM H. BRYAN,
Attorneys for Plaintiff in Error. [66]

[Endorsed]: Filed Aug. 2, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [67]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

Order Allowing Writ of Error.

Upon motion of J. C. Webster and William H. Bryan, attorneys for the plaintiff, John C. Davis, Trustee of the estate of Charles F. Willey, in bankruptcy, and upon filing a petition for a writ of error and an assignment of errors,

IT IS ORDERED, that a writ of error be, and it hereby is, allowed to have reviewed in the United States Circuit Court of Appeals for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and the same is hereby fixed at Three Hundred

($300.00) Dollars *Dollars;* said bond to serve as a bond on said writ of error.

Dated August 5th, 1920.

WM. C. VAN FLEET,
Judge of said Court.

[Endorsed]: Filed Aug. 5, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [68]

(NATIONAL SURETY COMPANY.)

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

Bond on Writ of Error.

KNOW ALL MEN BY THESE PRESENTS: That we, John C. Davis, Trustee of the Estate of Charles F. Willey, in bankruptcy, as Principal, and the National Surety Company, a corporation organized and existing under and by virtue of the laws of the State of New York, as Surety, are held and firmly bound unto E. T. Willey, said Defendant in Error, in the above-entitled cause, in the sum of three hundred dollars ($300), to be paid said defendant in error, to which payment well and

truly to be made we bind ourselves jointly and severally, firmly by these presents.

Sealed with our seals and dated this 16th day of August, 1920.

WHEREAS, the above-named plaintiff in error seeks to prosecute his Writ of Error to the United States Circuit Court of Appeals for the Ninth District to review and reverse the judgment entered in the above-entitled action by the Southern Division of the United States District Court in and for the Northern District of California, Second Division.

NOW, THEREFORE, the condition of this obligation is such, that if the above-named plaintiff in error shall prosecute his said Writ of Error to effect and answer all costs and damages that may be adjudged, if he shall fail to make good his plea, then this obligation to be void, otherwise to remain in full force and effect.

JOHN C. DAVIS,
NATIONAL SURETY COMPANY,
By FRANK H. POWERS,
Resident Vice-President.

[Corporate Seal]
Attest: F. J. CRISP.
Resident Asst. Secretary. [69]

State of California,
City and County of San Francisco,—ss.

On this 19th day of Aug. in the year one thousand nine hundred and twenty before me, John McCallan, a Notary Public in and for the said City and County

of San Francisco, residing therein, duly commissioned and sworn, personally appeared Frank H. Powers and F. J. Crisp known to me to be the Resident Vice-President and Resident Assistant Secretary, respectively, of the National Surety Company, the Corporation described in, and that executed the within instrument, and also know to me to be the persons who executed it on behalf of the Corporation therein named, and they acknowledged to me that such Corporation executed the same.

In Witness Whereof, I have hereunto set my hand and affixed my official seal, at my office in the City and County of San Francisco, the day and year in this certificate first above written.

[Seal] JOHN McCALLAN,

Notary Public in and for the City and County of San Francisco, State of California.

Approved this 20th of August, 1920.

WM. C. VAN FLEET,

Judge.

[Endorsed]: Filed Aug. 20, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [70]

UNITED STATES OF AMERICA.

District Court of the United States, Northern District of California, Southern Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

Affidavit of William H. Bryan.

State of California,
City and County of San Francisco,—ss.

William H. Bryan, being first duly sworn on oath, says: That he is now, and at all times herein mentioned was, a citizen of the United States, over the age of 21 years, and not a party to the above-entitled action; that on the 20th day of August, 1920, he served the Writ of Error and Citation on Writ of Error issued in the above-entitled action on August 20, 1920, upon William E. Billings, attorney for defendant, by leaving a true copy of each of the same at his office in the Hearst Building, City and County of San Francisco, State of California, with a person in charge thereof, between the hours of ten o'clock A. M. and 4 o'clock P. M. of said day.

WILLIAM H. BRYAN.

Subscribed and sworn to before me this 24th day of August, 1920.

[Seal] CHARLES R. HALTON,
Notary Public in and for the City and County of San Francisco, State of California.

[Endorsed]: Filed Aug. 30, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [71]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

Clerk's Office.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

Praecipe for Transcript of Record.

To the Clerk of Said Court:

Sir: Please prepare record on writ of error in the above-entitled cause and include therein the following papers:

Amended complaint;

Amendment to amended complaint;

Answer;

Amendment to Answer;

Opinion of the Court;

Stipulation for Findings;

Findings of Fact and Conclusions of Law;

Judgment entered February 20, 1920;

Certificate to Judgment-roll;

Notice of Decision;

Engrossed Bill of Exceptions, with order settling, certifying and allowing the same;

Assignment of Errors;

Petition for Writ of Error;

Order Allowing Writ of Error;

Bond on Writ of Error;

Writ of Error;

Citation on Writ of Error;

Affidavit of Service of Writ of Error and Citation on Writ of Error.

Defendant's Exhibit "A" (part of Bill of Exceptions—Judgment-roll in Davis v. Willey, No. 341 In Equity);

This Praecipe.

Dated August 27, 1920.

J. C. WEBSTER,
WILLIAM H. BRYAN,
Attorneys for Plaintiff.

[Endorsed]: Filed Aug. 30, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk. [72]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Tustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

Certificate of Clerk U. S. District Court to Transcript of Record.

I, Walter B. Maling, Clerk of the District Court

of the United States, for the Northern District of California, do hereby certify the foregoing seventy-two (72) pages, numbered from 1 to 72, inclusive, to be full, true and correct copies of the record and proceedings as enumerated in the praecipe for record on writ of error, as the same remain on file and of record in the above-entitled cause, in the office of the clerk of said Court, and that the same constitute the return to the annexed writ of error.

I further certify that the cost of the foregoing return to writ of error is $27.70; that said amount was paid William H. Bryan, attorney for plaintiff, and that the original writ of error and citation issued in said cause are hereto annexed.

IN WITNESS WHEREOF, I have hereunto set my hand and affixed the seal of said District Court this 6th day of October, A. D. 1920.

[Seal] WALTER B. MALING,
Clerk United States District Court, for the Northern District of California. [73]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

Writ of Error.

United States of America,—ss.

The President of the United States to the Honorable the Judges of the District Court of the United States, Northern District of California, GREETING:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you, or some of you, between John C. Davis, Trustee, of the estate of Charles F. Willey, in bankruptcy, plaintiff and plaintiff in error, and E. T. Willey, defendant and defendant in error, a manifest error hath happened to the great damage of the said John C. Davis, trustee aforesaid, plaintiff in error, as by said complaint appears; and we being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the said parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the City and County of San Francisco, in the State of California, on the 19th day of September, 1920, in the Circuit Court of Appeals, to be then and there held, that [74] the record and proceedings aforesaid being inspected, the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right,

and according to the laws and customs of the United States should be done.

WITNESS, the Honorable ————, United States District Judge for the Northern District of California, the 20th day of August, in the year of our Lord one thousand nine hundred and twenty.

[Seal] WALTER B. MALING,
Clerk of the United States District Court, Northern District of California.

By J. A. Schaertzer,
Deputy Clerk.

Allowed.

WM. C. VAN FLEET,
Judge. [75]

[Endorsed]: No. 16,147. Southern Division of the United States District Court, in and for the Northern District of California, Second Division. John C. Davis, Trustee, etc., Plaintiff, vs. E. T. Willey, Defendant. Writ of Error. Filed Aug. 21, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

(Return to Writ of Error.)

The answer of the Judge of the District Court of the United States, in and for the Northern District of California, Second Division.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court to the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at

the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

[Seal] WALTER B. MALING,
Clerk United States District Court Northern District of California. [76]

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee, etc.,

Plaintiff,

vs.

E. T. WILLEY,

Defendant.

Citation on Writ of Error.

The President of the United States of America, to E. T. Willey, and to William E. Billings, His Attorney, GREETING:

You and each of you are hereby cited and admonished to be and appear in the Circuit Court of Appeals for the Ninth Circuit, in the City and County of San Francisco, State of California, within thirty days from and after the date this citation bears, pursuant to a writ of error filed in the office of the clerk of the United States District Court for the Northern District of California, Second Division, in the above-entitled cause, wherein John C. Davis, trustee of the estate of Charles F. Willey, in bank-

ruptcy, is plaintiff, and E. F. Willey is defendant, to show cause, if any there be, why the judgment made and rendered in the above-entitled cause on the 20th day of February, 1920, against said John C. Davis, as such trustee, as plaintiff in said writ of error mentioned, should not be corrected and reversed, and why said justice should not be done to the parties in that behalf.

WITNESS, the Honorable WILLIAM C .VAN FLEET, United States District Judge for the Northern District of California, this 20th day of August, 1920.

WM. C. VAN FLEET,
United States District Judge for the Northern District of California. [77]

[Endorsed]: No. 16,147. Southern Division of the United States District Court. in and for the Northern District of California, Second Division. John C. Davis, Trustee, etc., Plaintiff, vs. E. T. Willey, Defendant. Citation on Writ of Error. Filed Aug. 21, 1920. W. B. Maling, Clerk. By J. A. Schaertzer, Deputy Clerk.

[Endorsed]: No. 3584. United States Circuit Court of Appeals for the Ninth Circuit. John C. Davis, as Trustee of the Estate of Charles F. Willey, in Bankruptcy, Plaintiff in Error, vs. E. T. Willey, Defendant in Error. Transcript of Record. Upon Writ of Error to the Southern Division of

the United States District Court of the Northern District of California, Second Division.

Filed October 6, 1920.

F. D. MONCKTON,
Clerk of the United States Circuit Court of Appeals for the Ninth Circuit.

By Paul P. O'Brien,
Deputy Clerk.

United States Circuit Court of Appeals for the Ninth Circuit.

JOHN C. DAVIS, Tr., etc.,
Plaintiff in Error,

vs.

E. T. WILLEY,
Defendant in Error.

Order Extending Time to and Including October 18, 1920, to File Record and Docket Cause.

Good cause being shown, it is hereby ordered that the plaintiff in error may have to and including October 18, 1920, within which to file the record on writ of error and docket the cause in the United States Circuit Court of Appeals for the Ninth Circuit.

Dated September 18, 1920.

WM. W. MORROW,
U. S. Circuit Judge.

[Endorsed]: No. 3584. United States Circuit Court of Appeals for the Ninth Circuit. Order Under Subdivision 1 of, Rule 16 Enlarging Time to and Including Oct 18, 1920, to File Record and Docket Cause. Filed Sep. 18, 1920. F. D. Monckton, Clerk. Refiled Oct. 6, 1920. F. D. Monckton, Clerk.

In the Southern Division of the United States District Court, in and for the Northern District of California, Second Division.

No. 16,147.

JOHN C. DAVIS, Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff,

vs.

E. T. WILLEY,
Defendant.

Certificate of Clerk U. S. District Court Re Date of Filing of Complaint and Issuance of Summons.

United States of America,
Northern District of California,—ss.

I, Walter B. Maling, Clerk of the United States District Court for the Northern District of California, hereby certify that the complaint in the above-entitled action was filed on the 26th day of March, 1918, in the above-entitled court and summons was issued thereon on the same day.

IN WITNESS WEREOF, I have hereunto set my hand and affixed the seal of said District Court this 6th day of January, A. D. 1921.

[Seal] WALTER B. MALING,
Clerk United States District Court for the Northern District of California.

[Endorsed]: No. 3584. United States Circuit Court of Appeals for the Ninth Circuit. John C. Davis, Trustee, etc., vs. E. T. Willey. Certificate of Clerk U. S. District Court Re Date of Filing of Complaint and Issuance of Summons. Filed Jan. 6, 1921. F. D. Monckton, Clerk. By Paul P. O'Brien, Deputy Clerk.

No. 3584

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN C. DAVIS, as Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff in Error,

vs.

E. T. WILLEY,
Defendant in Error.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

BRIEF FOR PLAINTIFF IN ERROR.

J. C. WEBSTER,
Sonora,

WILLIAM H. BRYAN,
625 Market Street, San Francisco,

Attorneys for Plaintiff in Error.

No. 3584

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN C. DAVIS, as Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff in Error,

vs.

E. T. WILLEY,
Defendant in Error.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of Facts.

In the year of 1911 Edward McGinn was the owner of a one-sixth interest in a gold mine in Mariposa County, California. Title to the mine stood in the name of his brother-in-law, Charles F. Willey. Charles F. Willey had given a bond or option on the mine to a prospective purchaser, who developed it and elected to purchase it. In that year

the purchaser paid to Charles F. Willey a part of the purchase price. Edward McGinn demanded of said Willey that he pay over McGinn's one-sixth of the moneys paid, but Willey refused, and denied McGinn's right thereto. McGinn then sued Willey in the Superior Court of Mariposa County, California, to recover McGinn's share of the moneys already paid, and to determine that McGinn was the owner of a one-sixth interest. (Tr. pp. 19, 26, 27.) This action was tried on February 8, 1912, and submitted for decision. Judgment therein was rendered and entered on May 3, 1912, in favor of McGinn and against Charles F. Willey, for $1040 in money, and decreeing that McGinn was the owner of a one-sixth interest in the mine. (Tr. pp. 20, 27.) Between the trial and entry of judgment further payments were made by the purchasers to Charles F. Willey, McGinn's one-sixth thereof amounting to $457.73. (Tr. p. 29.)

Charles F. Willey appealed from the judgment to the District Court of Appeal of California, Third Appellate District. The judgment was affirmed by that court on April 8, 1914, and a petition by Willey to the Supreme Court of California for a rehearing was made, and was denied, and remittitur to the Superior Court of Mariposa County was made on June 8, 1914. (Tr. p. 3.) On June 20, 1914, Charles F. Willey filed his petition in the District Court of the United States, Northern District of California, for voluntary bankruptcy, and was adjudicated a bankrupt. The first meeting

of the creditors was held on April 3, 1915, and John C. Davis, plaintiff herein, was appointed trustee for the creditors. On May 20, 1915, the bankrupt applied for discharge in bankruptcy, and upon objection being made thereto, said District Court, on June 19, 1915, referred the matter to the Referee in Bankruptcy for hearing on the objections. Said hearing took place February 2, 1916. The report of the Referee thereon was filed May 16, 1917, and on May 22, 1917, the petition of the bankrupt for discharge was denied. (Tr. pp. 28, 29.)

On February 26 or 27, 1912, after the trial of the action by McGinn against Charles F. Willey, and pending decision therein, said Willey withdrew from the Hibernia Savings & Loan Society $1294.97; from the Stockton Savings & Loan Society, $1252.02, and from a savings account in a Sonora, California, bank, $840.38, the same being all the moneys and property of which he was possessed, which were exempt from execution, and deposited the same in the First National Bank of Sonora, California, said bank giving therefor a certificate of deposit in the name of C. A. Belli, cashier. C. F. Willey then stated to the assistant cashier of said bank that he desired the deposit to be made so that the money could not be attached. This amount was reduced by $100 on March 13, 1912, a new certificate in the same form and name being issued for $3287.37. On May 28, 1912, Charles F. Willey cashed the certificate of

deposit, and with the proceeds caused to be opened two accounts in the same bank in the name of his brother, E. T. Willey, defendant herein; one a savings account for $1500; the other a "special account" for $1787.37. E. T. Willey had another account in the bank at the same time. (Testimony of Burden and Knowles, Tr. pp. 29-33.) This transfer was made, as the court finds in this action, secretly, without consideration, and with the intent, and for the purpose, of defrauding McGinn out of moneys owed him by Charles F. Willey, and to prevent the enforcement of any judgment which might be rendered in McGinn's favor in the pending action, and with the full knowledge of E. T. Willey of such intent and purpose and consent thereto. (Tr. p. 19.) On October 25, 1913, the savings account, then amounting to $1565, was withdrawn by E. T. Willey. The moneys in the other account were drawn out at various times by E. T. Willey.

In the action by Edward McGinn against C. F. Willey, in the Superior Court at Mariposa County, an execution was issued upon the judgment in favor of McGinn, and levied by William Sweeney, sheriff of Tuolumne County, upon an automobile as the property of Charles F. Willey. The automobile was sold under the execution and the proceeds of the sale, $437.50, credited on the judgment. (Tr. pp. 27-28-29.) Thereafter, E. T. Willey sued the sheriff, Sweeney, in the Superior Court of Tuolumne County, for conversion of the automobile, claiming that he had paid for it, and that it was

his own. This suit against the sheriff was tried on March 14, 1914, J. C. Webster being the attorney for the defendant, Sweeney. On the trial, E. T. Willey was a witness and testified that he had paid for the automobile out of moneys of his own, saved up from his labor, which he had deposited in bank a short time before the machine was purchased, and on which account he had drawn a check to pay for it. (Tr. pp. 37-39.) An officer of the bank on which the check was drawn testified that the deposit was created by a transfer of funds from an account of Charles F. Willey, in February, 1912. (Tr. p. 35.) McGinn was present at the trial. Verdict and judgment went for the plaintiff, E. T. Willey. At some subsequent time, a motion for a new trial was made and granted, but the action was not further prosecuted. (Tr. pp. 27, 28.) At the meeting of the bankrupt's creditors on April 3, 1915, plaintiff was appointed trustee. Upon examination of the bankrupt the facts relative to the transfer of the moneys by the bankrupt to E. T. Willey, as hereinbefore set forth, were learned.

On March 14, 1917, plaintiff herein commenced a suit in equity against Mrs. Charles F. Willey and E. T. Willey, being No. 341 in Equity, United States District Court, Northern District of California, alleging that Charles F. Willey had transferred about $3300 to said defendants in fraud of his creditors, and praying a decree for the payment of such sum to plaintiff and for general relief. In

that suit E. T. Willey made separate answer, setting up that the money alleged to be transferred to him was in payment of a debt then owing to him from Charles F. Willey, and that the plaintiff's remedy against him, if any, was at law, and not in equity. (Tr. Defendant's Exhibit B, pp. 47-52, 54-57.) At the trial of said suit in equity, No. 341, on January 15, 1918, it appeared from the evidence that Mrs. Charles F. Willey had received from E. T. Willey the proceeds of the savings account, $1565. E. T. Willey, Charles F. Willey and Mrs. Charles F. Willey all testified that the moneys paid to E. T. Willey were in payment of moneys previously loaned by E. T. Willey to Charles F. Willey. The court held that Mrs. Charles F. Willey should pay over to the trustee $1565; that E. T. Willey's plea that he had a legal defense and was entitled to a jury trial was good, and the suit as against E. T. Willey was not triable in equity, and decreed payment by Mrs. C. F. Willey accordingly, and dismissed the suit as to defendant, E. T. Willey. (Tr. pp. 61-64.)

The present action at law was commenced March 26, 1918, (Tr. p. 85) against E. T. Willey, to recover the sum of $3387, transferred to him in 1912, as above set forth, by the bankrupt, Charles F. Willey, in fraud of his creditors. A jury trial was waived and the cause heard by the court. On the day of the trial, August 28, 1919, defendant amended his answer to plead the judgment in equity suit No. 341 as a bar to this action. The

court found that said transfer was made to E. T. Willey by the bankrupt in fraud of his creditors, but further found that the decree or order in equity suit No. 341, dismissing that suit as to E. T. Willey, constituted a bar to this action at law. (Tr. p. 22.) The court further found that the action was barred by subdivision 4 of Section 338, Code of Civil Procedure of California, on the ground that Edward McGinn and his attorney had notice from the testimony given on the trial of the suit of *Willey v. Sheriff Sweeney,* more than three years before this action was commenced, of a transfer of moneys by Charles F. Willey to E. T. Willey on the books of the bank sufficient to put McGinn on inquiry as to the fraud complained of in this action. (Tr. pp. 21-22.) Judgment for defendant was entered on the findings, and plaintiff now prosecutes these proceedings in error to this court.

Plaintiff relies upon the particular errors assigned (Tr. pp. 69-70) as follows:

1. The court erred in making its conclusions of law and entering judgment in favor of defendant, and against plaintiff, on the facts as found by the court.

2. The decision was contrary to, and against, law.

3. That the court erred in making its conclusion of law that the action was barred by the order or decree dismissing as to defendant, E. T. Willey, the suit of John C. Davis, trustee, etc., against E. T.

Willey and Mrs. Charles F. Willey, No. 341 in equity, and rendering and entering judgment for defendant thereon.

4. The court erred in finding that the disclosure at the trial of *Willey v. Sweeney* of a transfer on the bank records from Charles F. Willey to E. T. Willey was such as to put Edward McGinn and the trustee, John C. Davis, upon inquiry as to the fraud in said transfer, and erred in making its conclusions of law thereon that the action was barred by the provision of Subdivision IV of Section 338 of the Code of Civil Procedure of the State of California, and in rendering and entering judgment for defendant thereon.

5. The court erred in making its conclusion of law that the action was barred by the provisions of Section 338 of the Code of Civil Procedure of the State of California, and in rendering and entering judgment for defendant thereon because this action is not governed as to limitations by the statutes of California, but only by the provisions of the Bankruptcy Act.

Argument.

The judgment to review which this writ of error is prosecuted was rendered in an action brought under the authority of Section 70(e) of the Bankrupty Act, which section provides, since the amendment of 1905:

> "The trustee may avoid any transfer by the bankrupt of his property which any creditor of such bankrupt might have avoided and may recover the property so transferred or its value, from the person to whom it was transferred, unless he has a bona fide holder for value prior to the date of the adjudication. Such property may be recovered or its value collected from whoever may have received it, except a bona fide holder for value."

The trial court has found on the evidence (Finding II, Tr. p. 19) that the transfer by the bankrupt to the defendant was fraudulently made as against creditors.

THE ACTION IS NOT BARRED BY THE DECREE IN SUIT No. 341 IN EQUITY.

Considering first the third error assigned, the action is not barred by the decree or order in equity suit No. 341 in the District Court dismissing that suit as to defendant, E. T. Willey. In suit No. 341, commenced and tried prior to the commencement of this action, defendant, E. T. Willey, answered separately, setting up a legal defense as follows:

> "Defendant alleges that some time in March, 1912, the exact date of which is now unknown to said answering defendant, said Charles F. Willey paid back certain moneys that he had previously borrowed from answering defendant, but that none of the moneys so paid by said Charles F. Willey to said answering defendant were the moneys received by said Charles F. Willey for said one-sixth interest in said, or any, mining claim, and that all of said

moneys so paid by said Charles F. Willey to said answering defendant were lawfully paid in settlement of legal obligations owing from said Charles F. Willey to said answering defendant." (Tr. pp. 55-56.)

"As a further, separate and distinct defense to said complaint, said answering defendant avers that the said complaint does not state facts sufficient to entitle the said plaintiff to the equitable relief demanded therein, but on the contrary, it appears on the face thereof that said plaintiff has an adequate, legal remedy against said answerng defendant, if he has any remedy at all." (Tr. p. 56.)

After hearing the evidence in this equity suit No. 341, the court found as to these defenses as follows:

"E. T. Willey received from the funds of Mr. Willey, about eight months prior to the time of his filing his petition in bankruptcy, if I remember right, $1787. This was received by him as testified to by him, by Mrs. Willey, and by the bankrupt, Mr. Willey, in payment of advances made by him prior to that time to the bankrupt, Willey. So that the payment of this creditor, if he was a creditor, made prior to the four months' period preceding adjudication, would not under the Bankruptcy Act, be a fraudulent preference. It would be a payment which the bankrupt had a right to make. That indebtedness is a matter which could not be determined in the original bankruptcy proceedings. It would have to be determined in a plenary action where Willey would have a right to have the issue passed upon by a jury." (Tr. p. 64.)

DEFENDANT HAVING SUCCESSFULLY MAINTAINED IN THE EQUITY SUIT THAT HE WAS ENTITLED TO A JURY TRIAL, CANNOT CHANGE HIS POSITION AND THEREBY ESCAPE LIABILITY IN A SUIT AT LAW.

Defendant must be subject to the court either in equity or at law. He pleads and gives evidence in the equity suit that he has a legal defense and the right to a jury trial, and the court thereon sustains his objection to its jurisdiction. Plaintiff then brings suit at law on exactly the same cause of action and in the same court, pleading the same facts and no others. The case comes before another judge of the court. Then on the day of trial defendant amends his answer to plead in bar the very judgment that he sought—the judgment that he could only be sued at law and dismissal thereon.

This he is estopped to do. Having gained the benefit of his contention in the equity suit and escaped being pierced by that horn of his dilemma, he cannot in the law suit claim he gained that benefit wrongfully, that he should have been impaled, and insist that he shall so escape the remaining horn of his dilemma. The law does not permit such shifting of position to enable a party to escape liability.

The Supreme Court has considered and determined this question. In *Wakelee v. Davis,* 156 U. S. 680, it considered a case where a bankrupt had in the bankruptcy proceedings successfully contended that a certain claim and judgment was not affected by the bankruptcy, and would not be dis-

charged thereby, and the claimant had then withdrawn his claim in bankruptcy. In a subsequent suit on the judgment the bankrupt sought to establish that the action was barred by his discharge in bankruptcy. In holding such position untenable, the court said (p. 689):

> "It may be laid down as a general proposition that, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him."

And see authorities therein cited.

THE COURT SHOULD BE HELD BOUND IN THE SUIT AT LAW BY THE RULING IN THE EQUITY SUIT.

The suit in equity and the suit at law, being for the same purpose on the same facts, and the one immediately succeeding the dismissal of the other, are essentially one proceeding. The ruling in the first suit that the remedy was at law should be held binding on the court throughout the proceeding. The rule applied by Judge Field in *Cole Silver Mining Co. v. Virginia Water Co.*, 1 Saw. 685; Fed. Cas. No. 2990, that rulings by one judge of the Circuit Court are not open to review by another judge sitting in the same court and case, should be

applied. That case is cited, and the rule applied in the following cases:

Oglesby v. Attrill, 14 Fed. 214;
Preston v. Walsh, 10 Fed. 316;
Giant Powder Co. v. California Powder Co., 5 Fed. 202.

And the ruling should be applied in the present case, not merely for the reasons given in those cases, but for the greater reason that to refuse to apply it is to deny plaintiff's right altogether.

In *Reynolds v. Mining Co.,* 33 Fed. 354, it is held that a Circuit Judge is bound by the rulings of the District Judge, though the ruling was sought in an independent application, the opinion commenting at length upon the prejudice arising by opposite rulings of different judges in the course of continuing litigation.

Taylor v. Decatur Mineral Co., 112 Fed. 449, and

Meeker v. Lehigh Valley R. R. Co., 175 Fed. 320,

are cases applying the rule.

Defendant in error contended, in the suit in equity, that he had legal defenses. He now contends, in this action at law for the recovery of the same moneys and based on the same facts, that he has no legal defenses and no right to a jury trial; thus would he escape both horns of his dilemma.

THE DECREE, OR ORDER OF DISMISSAL, IN THE EQUITY SUIT IS NOT A BAR TO THE SUIT AT LAW.

For further and different reasons the decree in equity suit No. 341 does not bar this action.

The terms of the decree merely adjudge that the trustee could not proceed in equity over the plea by the defendant of a legal defense, and that the action should be at law. The decree was a denial of the right to take jurisdiction in equity, and a refusal to take such jurisdiction of the suit as against the defendant, E. T. Willey.

If, in suit No. 341, (1) defendant, E. T. Willey, had the right to have the issues presented by his answer tried by a jury, or (2) if plaintiff had a plain, speedy and adequate remedy at law, or (3) if the court had the duty of discretion to leave the plaintiff to his action at law, then the present action at law is properly brought and is not barred by the dismissal in equity of E. T. Willey.

Section 723 of the United States Revised Statutes, enacted in 1789, provides that suits in equity shall not be maintained in the courts of the United States where there is a plain, speedy and adequate remedy at law. This section is merely declaratory, being intended to emphasize the settled rule and impress it upon the attention of courts.

The Supreme Court of the United States in *Buzard v. Houston,* 119 U. S. 351, on page 352, after referring to the enactment of Section 723, says:

"Five days later, on September 29, 1789, the same Congress proposed to the Legislatures of the several States the article afterwards ratified as the Seventh Amendment of the Constitution, which declares that 'In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved'. 1 Stat. at L. 21, 98.

The effect of the provision of the Judiciary Act, as often stated by this court, is that 'Whenever a court of law is competent to take cognizance of a right, and has power to proceed to a judgment which affords a plain, adequate and complete remedy, without the aid of a court of equity, the plaintiff must proceed at law, because the defendant has a constitutional right to a trial by jury' (citing cases). In a very recent case the court said: 'This enactment certainly means something; and if only declaratory of what was always the law, it must, at least, have been intended to emphasize the rule, and to impress it upon the attention of the courts" (citing cases).

Accordingly, a suit in equity to enforce a legal right can be brought only when the court can give more complete and effectual relief, in kind or in degree, on the equity side than on the common-law side; as, for instance, by compelling a specific performance, or the removal of a cloud on the title to real estate; or preventing an injury for which damages are not coverable at law, as in *Watson v. Sutherland,* 5 Wall. 74 (72 U. S. bk. 18, L. ed. 580); or where an agreement procured by fraud, is of a continuing nature, and its recision will prevent a multiplicity of suits (citing cases).

In cases of fraud or mistake, as under any other head of chancery jurisdiction, a court of the United States will not sustain a bill in equity to obtain only a decree for the payment

> of money by way of damages, when the like amount can be recovered at law in an action sounding in tort or for money had and received."

The same court, in *Wehrman v. Conklin,* 155 U. S. 314 (p. 323), in referring to Section 723 says:

> "These provisions are obligatory at all times and under all circumstances and are applicable to every form of action."

To the same effect are:

Grether v. Wright (C. C. A.), 75 Fed. 742, 749;

Warmath v. O'Daniel (C. C. A.), 159 Fed. 87, 89.

The jurisdiction of the Federal Courts as to law and equity is not affected by State statutes or practice.

> "Although the forms of proceedings and practice in the State courts have been adopted by the District Courts yet the adoption of the state practice must not be understood as confounding the principles of law and equity nor as authorizing legal and equitable claims to be blended together in one suit."
>
> *Bennett v. Butterworth,* 52 U. S. 668, 674.

To the same effect are:

Scott v. Neely, 140 U. S. 106;

Peck v. Ayers (C. C. A.), 116 Fed. 273.

THE PLAINTIFF IN SUIT No. 341 HAD AN ADEQUATE REMEDY AT LAW.

It is established that a trustee in bankruptcy may proceed at law against a fraudulent transferee of the bankrupt to recover the property transferred or its value, that law and equity courts have concurrent jurisdiction in fraudulent transfers, and that where there is an adequate remedy at law equity will not assume jurisdiction, but will do so only where the law will not afford adequate relief.

In *Warmath v. O'Daniel* (C. C. A.), 159 Fed. 87, an action by a trustee to recover the value of an alleged preferential transfer of property to a creditor, the defendant objected to the jurisdiction of equity. On appeal the decree for plaintiff was set aside on the ground that the action was at law and the defendant was entitled to a jury trial. We quote from the opinion, page 88:

> "The evidence produced would be, and was in this case, as completely available in an action at law as in a court of equity. No injunction was sought or required. The issue was one which a jury could readily understand and decide under proper instructions from the court in respect to the law. It is suggested that the court must first set aside the transfer before it could proceed to judgment, and that it is the peculiar province of a court of equity to set aside unlawful transfers. This is an ingenious, but unsubstantial figment. No distinct or formal preliminary action was required or contemplated by the statute. If the defendant had obtained part of the estate which should have come to all the creditors, proof of that fact would entitle the trustees to recover it.

Perhaps there may be cases where a declaration of the court may be necessary to completely fulfill all requirements, as where the transfer has been accomplished by a deed or other solemn instrument which may be made matter of record, or is a muniment of title, the existence of which would indicate ownership and the right to sell and convey or mortgage, or do such other things with it as belong to ownership. But in the present case nothing is stated in the bill which makes such a proceeding necessary, nor indeed is anything more required than in any ordinary action at law where the plaintiff is always bound to establish the facts which create the liability, whereupon, and without more, the court gives judgment for the sum he is entitled to recover. And that was what occurred in the present instance. There was no preliminary declaration that this transfer be set aside. The suggestion made would be the adoption of a devise for evading the statute forbidding a resort to a court of equity.

The right of a defendant to have his liability determined in an action at law is a substantial one, the value of which is recognized and protected by the statute (section 723, Rev. St. U. S. Comp. St. 1901, p. 583), which declares that 'suits in equity shall not be sustained in either of the courts of the United States in any case where a plain, adequate, and complete remedy may be had at law'. The defendant is thereby given an opportunity to have his controversy tried by a jury, a privilege of sufficient importance to be secured by the Constitution and guarded by this positive statute."

The opinion then comments further upon the importance and effect of this statutory injunction to the Federal courts to observe the rule and re-

viewing *Miller v. Steele* (C. C. A.), 153 Fed. 714, which involved a trust relation, saying:

> "But it was held that such a circumstance as the existence of a trust was not controlling; that the leading and dominant proposition is that when the capacity of a court of law is sufficient to give a suitable remedy, that is the proper forum in which to try the cause and obtain the proper relief, and said: 'The remedy may be inadequate because the procedure at law is too inflexible to suit the exigencies of the case, or because the relief which a common-law judgment can afford is not adaptable to the particular facts. When neither of these difficulties are in the way, there can be no reason for resorting to a court of equity'."

To the same effect are the following:

20 Cyc., 94;
16 Cyc., 81;
Phipps v. Sedwick, 95 U. S. 99;
Oelrichs v. Spain, 15 Wall. 211;
Wetstein v. Franciscus (C. C. A.), 133 Fed. 900;
Sessler v. Nemcoff, 183 Fed. 656;
Stern v. Mayer, 91 N. Y. Supp. 292;
Merritt v. Holliday, 95 N. Y. Supp. 331;
Cohen v. Small, 120 App. Div. 211 (affirmed 190 N. Y. 568);
Allen v. Gray, 201 N. Y. 504;
Spores v. Maude, 81 Ore. 11;
Boonville Natl. Bank v. Blakey, 166 Indiana 427; 76 N. E. 529.

The judgment roll in suit No. 341 shows a minute order dismissing the suit as to defendant, E. T.

Willey. (Tr. p. 61.) It is not an adjudication upon the merits. The order is one of dismissal or nonsuit only. That it was so intended appears from the language of the decree. (Tr. p. 64.) Such a dismissal is not, and does not purport to be, a determination on the merits. It is not a determination that plaintiff had no right to recover in any event against E. T. Willey, but that E. T. Willey had a legal defense, and plaintiff could not proceed in equity as against it. Such dismissal does not bar an action at law upon the same cause of action.

18 Corpus Juris, 1180;
18 Corpus Juris, 1201, 1207, 1208;
6 Enc., Pleading and Practice, p. 895;
6 Enc., Pleading and Practice, p. 986-988;
St. Romes v. Levee, etc., Co., 127 U. S. 614.
Harrison v. Remington Co. (C. C. A.), 140 Fed. 385;
Cramer v. Moore, 36 Ohio State, 347, 350;
Butchers' Assn. v. City of Boston, 137 Mass. 186;
Spores v. Maude, 81 Oregon 11.

In *Harrison v. Remington Co., supra,* the rule is stated:

> "Rulings and decisions in the course of an action which is finally dismissed without prejudice adjudge nothing, because the final judgment by its terms is that nothing has been adjudicated, and this fact is the only *res adjudicata.* Such a judgment determines that the parties are left as free to litigate every issue in the action dismissed as they would have been if it had never been commenced."

THE ACTION IS NOT BARRED BY ANY STATUTE OF LIMITATIONS.

Considering the fifth error assigned—The action was not barred by the provisions of the Code of Civil Procedure of California (Subd. 4, Sec. 338). The action is not governed by the California statute of limitations, but only by the statute of limitations provided by the Bankruptcy Act. The action is brought by the trustee under authority of Section 70, subdivisions (a) and (e) of the Bankruptcy Act. These provisions give the trustee the title to the money fraudulently transferred, and the right to recover it, and also the District Court as a court of bankruptcy as a forum having original jurisdiction of his action. His action is under the Bankruptcy Act, and is governed by the statute which gives it to him. It is governed as to the period of limitation by the provisions of that Act, and the trustee can proceed at any time provided by that Act.

Section 11 (d) of the Bankruptcy Act of 1898 provides:

> "Suits shall not be brought by or against a trustee of a bankrupt estate subsequent to two years after the estate has been closed."

This section constitutes a new statute of limitations superseding all State and Federal statutes as to the suits to which it applies, and unless a suit was barred when the adjudication in bankruptcy was made, it is not barred until two years after the estate is closed.

The Bankruptcy Act of 1867 (R. S., Sec. 5057) provided:

> "No suit, either at law or in equity, shall be maintainable in any court between an assignee in bankruptcy and a person claiming an adverse interest, touching any property or rights of property transferable to or vested in such assignee, unless brought within two years from the time when the cause of action accrued for or against such assignee. And this provision shall not in any case revive a right of action barred at the time when an assignee is appointed."

This provision is construed and applied in *Bailey v. Glover,* 88 U. S. 342, in an action by an assignee to set aside fraudulent conveyance of the bankrupt. The court says (page 346):

> "This is a statute of limitation. It is precisely like other statutes of limitation, and applies to all judicial contentions between the assignee and other persons touching the property of the bankrupt transferred to or vested in the assignee."

This decision treats this provision as a Federal statute of limitation in bankruptcy matters, independent of State statutes. This provision of the Act of 1867 is also treated as a statute of limitation in suits by the trustee in the following cases:

Avery v. Cleary, 132 U. S. 604;
Jenkins v. International Bank, 106 U. S. 571;
Traer v. Clews, 115 U. S. 528;
Freelander v. Holloman, 9 N. B. R. 331; Fed. Cas. No. 5081.

In *Rock v. Dennett,* 155 Mass. 500, 30 N. E. 171, the Supreme Court of Massachusetts held that this provision controlled the State statute in an action

by the grantee of the assignee in bankruptcy against a transferee of the bankrupt's property.

Section 11 (d) of the Bankruptcy Act of 1898 corresponds to the provisions of Section 2 of the Act of 1867 in providing for limitations in suits by or against the trustee. Section 11 (d) extends the time until two years after the estate is closed. That the effect of Section 11 (d) is to exclusively govern actions by the trustee is established by the following authorities:

> "Suits may be commenced by the trustee upon any action that was not barred by limitation at the beginning of the bankruptcy, and may be so commenced at any time within two years after the closing of the estate, notwithstanding the State statute may bar the action before the two years have expired. In short, the Act creates a new statute of limitations, except as to actions already barred when the bankruptcy proceedings were instituted."
>
> *Remington on Bankruptcy,* Sec. 1791.

> "This sub-section has reference to suits by the trustee, rather than those pending at the time of the bankruptcy. It is similar to the corresponding clause under the Act of 1867 in the period only, two years. The time under the statute began to run when the cause of action accrued in or against the assignee. The time does not now begin to run until 'the estate has been closed'. This sub-section constitutes an arbitrary limitation on suits, as to computation of time at least superseding all statutes, whether state or federal, provided the action is not barred at the time the petition in bankruptcy was filed. It seems also that the character of the suit is immaterial, provided it amounts to the prosecution of a demand in a court of

justice, in respect to the property or rights of property of the bankrupt."

Collier on Bankruptcy, (11th Ed.) p. 307.

The Supreme Court of Georgia, in *Arnold Grocery Co. v. Shackleford,* 3 A. B. R. 119, 140 Ga. 585, in an action brought under Section 60 (b) by the trustee in bankruptcy, after the bar of the State statute was complete, held, after reviewing the Federal cases construing the provisions of Section 2 of the Act of 1867, that the Federal statute controlled and the action was not barred, the court saying:

"Section 11 (d) was manifestly intended to apply, among others, to cases falling under section 60 (b) of the Act, to the exclusion of any other statute of limitations."

The Supreme Court of Nebraska, in *Sheldon v. Parker,* 66 Neb. 610, 92 N. W. 923, 11 A. B. R. 152, in an action under Section 70 (e) to recover property fraudulently transferred, where the State statute was pleaded as a defense, held that the State statute did not apply, but that Section 11 (d) governed the action.

The court says:

"The filing of the petition in bankruptcy by Lewis C. Parker vested in the federal court complete jurisdiction over his estate. After that date no creditor could bring an action either to recover his debt or to subject property fraudulently conveyed to its payment. Such actions by operation of the bankruptcy law, are vested in the trustee of the bankrupt estate. As we have seen, by the provision of section

11 (d) of the Bankruptcy Act, the trustee has two years from the closing of the estate to bring an action. In *Freelander v. Holloman,* Fed. Cas. No. 5081, also reported in 9 N. B. R. 331, the question of the application of the statute of limitation was considered by the court. It is there said: 'The construction of the United States conferred upon Congress the power to establish a uniform system of bankruptcy throughout the United States; and when Congress in pursuance of this power, passed the Bankruptcy Act, it at once superseded all laws in conflict with it. The bankrupt's estate and right and everything connected with it, upon the bankruptcy, at once passed under the control and operation of the bankrupt law. After that the rights of those in interest may be contracted or enlarged, as Congress in its wisdom may provide. This provision in the second section, provides that all rights of action barred upon the appointment of the assignee shall remain barred, whether in favor or against the assignee, and give both to the assignees and those claiming an adverse interest to any property claimed by the assignee in adverse possession of others or claimed by others, to property in the hands or under the control of the assignee, two years in which to commence proceedings in equity or at law for its recovery. This is a separate and independent provision, and has no connection with any State Statute on the subject. It may extend or may contract the time provided in the statute of limitations. Thus if at the time of the appointment of the assignee but a few days remained of the time necessary to complete the bar, the time would be extended: or, if the statute has just commenced running, and under the State Law would have ten years to run, as in cases of actions of ejectment to recover real estate, it would be complete within two years.''

The defendant's theory that the action is barred by the State statute assumes that a trustee on acquiring the right to sue under Section 70 (e) acquires with it a creditor's notice of the fraud and is bound by such notice and limited to the same time for suit which the creditor would have if he sued independently of bankruptcy under State statutes to avoid a fraudulent transfer.

Now can it reasonably be the law that the trustee is deemed to have acquired the knowledge of any creditor or be bound thereby? The Bankruptcy Act gives the trustee the title to the property fraudulently transferred. When he sues to recover it he sues as the representative of all creditors. It may be that one creditor has knowledge of a fraudulent transfer. Should the knowledge of this one creditor bar the trustee from maintaining a suit for all creditors to recover the property, even though it be greatly in excess of this creditor's debt? Or, if the transfer was made in fraud of all creditors, should those of the creditors who had knowledge of the fraud be deprived of their share of money recovered in an action by the trustee, if the trustee base his freedom from the bar of limitation upon the want of notice to other creditors? Or, should the trustee in such suit be entitled to recover only such proportionate share of the property transferred as the debts due the creditors, who were without notice of fraud, bear to the whole of the bankrupt's debts,—a ratio plainly impossible to determine until all debts have been proved and adjudicated, at which time the action might be barred?

To answer any of these questions in the affirmative is absurd. Is it not clearly the intention of the Bankruptcy Act to put an end to all such difficulties by creating a new and independent statute of limitations exclusively governing all actions by or against a trustee? It is submitted that the authorities above cited under this head correctly interpret and apply the provisions of Section 11 (d) of that Act, and that under that section the present action cannot be barred by the State statute of limitations.

THE TRUSTEE AND THE CREDITOR, McGINN, DID NOT HAVE NOTICE OF THE FRAUDULENT TRANSFER.

Considering the fourth assignment of error—Assuming for argument's sake that the State statute of limitations controls this action, the notice to the plaintiff and the creditor, McGinn, was not sufficient to set the State statute in motion.

The notice claimed to put Edward McGinn upon inquiry as to the fraudulent nature of the transfer was acquired at the trial of an action by *E. T. Willey v. Sheriff Sweeney* to replevin or recover the value of an automobile sold by the sheriff on execution against C. F. Willey in the McGinn suit against him. The automobile had been levied upon when in the possession of Charles F. Willey. E. T. Willey testified that the machine was paid for by him by a check upon his own bank account, that the moneys in that account had been earned by him and deposited

by him at various times and that he bought the machine as his own and it remained his property. (Tr. pp. 37-39.) There is nothing in the record to contradict this testimony. The jury accepted it as true and gave their verdict for E. T. Willey. The only evidence presented in that case, upon which defendant now relies as giving notice of a fraudulent transfer, consisted in the statement (Tr. pp. 34, 35), where Mr. Burden testified that the account on which the check was drawn, which paid for the machine, was at one time transferred from an account of C. F. Willey. In levying on the machine the sheriff was seizing the apparent and presumed property of Charles F. Willey. There is nothing to suggest that at the time of levy Edward McGinn had suspected a fraudulent transfer, or had caused the levy to be made for such reason. No fraudulent transfer was involved in that suit, the only scrap of evidence relating to the subject of transfer merely indicated a transfer, with nothing to suggest fraud in connection with it.

Again, the trial of *Willey v. Sheriff Sweeney* took place in March, 1914. It appears that a new trial was granted, but it does not appear when the motion therefor was made or granted. It may well be that affidavits offered on the motion for new trial (their makers and their character do not appear) were not made until after the filing of the petition and the adjudication in bankruptcy, at which time all rights of Edward McGinn had terminated and those of the trustee commenced.

It is submitted that even though the trustee be limited by the State statute, there is no proof of notice of the fraud sufficient to set the statute in motion.

Plaintiff's counsel believe that the first and second assignments of error are for all purposes covered by and fully discussed in the discussion of the third, fourth and fifth assignments of error, and need not be separately treated.

It is respectfully submitted:

1. That the action is not barred by the decree or order in suit No. 341 in equity;

2. That the action is not governed by the California statute of limitations, but is governed as to limitations by Section 11 (d) of the Bankruptcy Act, and is therefore not barred;

3. That if governed by the California statute of limitations, such statute was not set in motion by notice to the creditor, McGinn, or to the trustee more than three years before the commencement of this action;

4. That the judgment must be reversed.

Dated, San Francisco,
February 14, 1921.

Respectfully submitted,
J. C. Webster,
William H. Bryan,
Attorneys for Plaintiff in Error.

No. 3584

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

JOHN C. DAVIS, as Trustee of the Estate of CHARLES F. WILLEY, in Bankruptcy,
Plaintiff in Error,

vs.

E. T. WILLEY,
Defendant in Error.

Upon Writ of Error to the Southern Division of the United States District Court of the Northern District of California, Second Division.

BRIEF FOR DEFENDANT IN ERROR.

WILLIAM E. BILLINGS,
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PERNAU-WALSH PRINTING CO.

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BRIEF FOR DEFENDANT IN ERROR.

THE ACTION IS BARRED BY THE STATUTE OF LIMITATIONS.

The only question considered by the court below and which need be considered on this appeal is whether or not the cause of action alleged in the complaint of plaintiff in error is barred by the statute of limitations pleaded in the answer of defendant in error as a special defense. The court below held that it was barred by the said statute and we submit that said court committed no error in so holding.

As a special defense to the cause of action alleged in the complaint the defendant in error set up the statute of limitations (Tr. p. 9). The said statute is subdivision 4 of section 338 of the Code of Civil Procedure of the State of California, which reads as follows:

> "WITHIN THREE YEARS. An action for relief on the ground of fraud or mistake. The cause of action in such case not to be deemed to have accrued until the discovery, by the aggrieved party, of the facts constituting the fraud or mistake."

We submit first that the evidence in this case conclusively shows that the creditor, McGinn, in whose shoes the plaintiff in error stands, was in possession of part of the facts constituting the alleged fraud more than four years before commencing the action and was thereby given a clew that would have warranted him as a reasonable man in making a further investigation which would have disclosed all the facts.

THE FACTS DISCLOSED.

In the automobile suit in which McGinn was present and heard the testimony and in which his attorney, Webster, appeared and examined the witnesses in which this particular evidence was disclosed the following facts were brought out by W. E. Burden, the assistant cashier of the bank (Tr. pp. 34-35):

> "Q. Have you any record of the First National Bank of Sonora of an account which was in the First National Bank of Sonora in the year 1912?

A. Yes I have.

Q. I would like you, if you would, refer to your record and testify, if you can, when that account was created, and when and in what manner it was closed if at all.

A. The account of E. T. Willey, special, was created May 28, 1912, and closed by one check in June, 1912, and another in Sept., 1912.

Q. What was the amount of the special account at the time it was created?

A. 1787.37.

Q. What was the amount of the check, June 12, 1912?

A. The check was June, $794.00.

Q. Drawn on that special account in June?

A. Yes, sir.

Q. Now have you any record of how that special account was created?

A. Why by a transfer—it was created by a certificate of deposit in the name of C. A. Belli.

Q. Have you the record as to what that certificate of deposit was open for?

A. It was a transfer of funds from the account of C. F. Willey.

Q. When was that transfer made?

A. Why, in February, 1912."

The above testimony was given in March 10, 1914. This action was commenced on March 26, 1918. Consequently four years and sixteen days, to be exact, before this action was commenced the creditor, McGinn, and his attorney, Mr. Webster, knew all the facts with reference to the creation of the special account which is one of the fraudulent transfers which is the basis of this suit. They knew that this special account of $1787.37 had been created from the funds of C. F. Willey, the bankrupt. With reference to this particular account

they knew as much as they later learned in the bankruptcy proceedings. And they knew this at the very time that they were attempting to show that the automobile was fraudulently claimed by E. T. Willey because it had been purchased with funds that belonged to C. F. Willey. I submit, therefore, that not only did the creditor, McGinn, have a clew of the facts upon which the fraudulent transfer was made, but that he knew the facts themselves so far as to the transfer of the $1787.37 was concerned and that as a reasonable man it was his duty to have then made the investigation that would also have disclosed the transfer of the $1500.00 account, and not having done so, he is now barred in this action.

THE LAW UPON THE SUBJECT.

The Supreme Court of the United States, the Federal courts and the Supreme and Appellate courts of this state have repeatedly held that under facts similar to the above the defendant is barred.

One of the leading cases upon the subject is that of

Wood v. Carpenter, 101 U. S. 135.

In this case Wood sued Carpenter and obtained a judgment against him for some $8000.00. Afterward Carpenter transferred practically all of his real and personal property of the value of some $500,000.00 to his brother. Then Wood had Carpenter arrested under a process to satisfy his debt

and Carpenter in that proceeding testified that he was worth only $20.00. Afterward Carpenter had his brother-in-law go to Wood and induce him to sell him his judgment against Carpenter for 50 cents on the dollar, which he did. Subsequently all the property was transferred back into Carpenter's name. This was an action to set aside the whole transaction as fraudulent. Some six years had elapsed since the consummation of the fraudulent acts complained of, but the plaintiff alleged in his complaint that the said fraudulent acts were secret and concealed and did not come to the knowledge of the plaintiff but shortly before the action was commenced. The defendant set up in a demurrer to the complaint the statute of limitations in Indiana, which is or was at the time of that action practically the same as the California statute which we are invoking here. For the purpose of the demurrer all of the facts as alleged above and which were set forth in the complaint were taken as true.

Judge Sawyer, in speaking for the court in sustaining the demurrer, said in part:

> "Statutes of limitations are vital to the welfare of society and are favored in the law. They are found and approved in all systems of enlightened jurisprudence. They promote repose by giving security and stability to human affairs. An important public policy lies at their foundation. They stimulate to activity and punish negligence. While time is constantly destroying the evidence of rights, they supply its place by a presumption which renders proof

unnecessary. Mere delay, extending to the limit prescribed, is itself a conclusive bar. The bane and antidote go together.

The provisions in the statute of which the plaintiff seeks to avail himself was originally established in equity and has since been made applicable in actions at law. * * * Upon looking carefully into the reply, we find that it sets forth that the concealment touching the cause of action was affected by the defendants by means of the several frauds and falsehoods averred more at length in the complaint. The former is only a brief epitome of the latter. There is the same generality of statement and denunciation and the same absence of specific detail in both. No point in the complaint is omitted in the reply but no new light is thrown in which tends to show the relation of cause and effect, or in other words that the protracted concealment which is admitted necessarily followed from the facts and circumstances which are said to have produced it. It is to be observed also that there is no averment that, during the long period over which the transactions referred to extended, the plaintiff ever made or caused to be made the slightest inquiry in relation to either of them. Proper diligence would not have failed to point a clew in every case that would have led to evidence not to be resisted with the strongest motive to action. The plaintiff was supine. If underlying fraud existed he did nothing to unearth it. Whatever is notice enough to excite attention puts the party on his guard and call for inquiry, is notice to everything to which said inquiry might have led."

Morris v. Haggin, 28 Fed. 275.

This was an action in equity for a discovery and to have set aside certain conveyances and judgments

under which defendants got control and possession of certain lands and property near Sacramento, California. The complaint alleged that defendant took advantage of plaintiff while he was in an incompetent state and condition of mind due to a severe blow on the head and secured the conveyances and judgments through fraud from plaintiff while he was in such a state and that the fraud was only discovered a short while before the commencement of the action. Defendant demurred on the ground that the action was barred by the same section of the statute of limitations which is invoked here. After discussing the proposition that courts of equity are bound by the same statute of limitations that might be pleaded in legal actions, the court goes on to state:

> "Unless, therefore, the case can be brought within some exception of the statute, the suit is barred. The only exception, if any, that can reach the case or is claimed to reach it, is found in Section 338, Code of Civil Procedure, Sub. 4, which provides that the period shall be three years in case of an action for relief on the ground of fraud or mistake; the cause of action is in such case not to be deemed to have accrued until the discovery by the aggrieved party of the facts constituting the fraud. * * * To ascertain of what acts a discovery of the facts constituting the fraud affording the ground of relief consists, we must go to the principles established in equity law, whence the idea was derived. The settled principles on this point are that the party defrauded must be diligent in making inquiry; that the means to knowledge are equivalent to knowledge; that a clew to the facts, which, if followed up diligently would

> lead to a discovery is in law equivalent to a discovery—equivalent to knowledge. In stating the policy of statutes of limitations, and in illustrating these principles of construction applicable thereto, Mr. Justice Sawyer, speaking for the court in Wood v. Carpenter, supra (quoting from Wood v. Carpenter). He might have at least demanded possession and asked by what right he was kept out of his own. He might have brought a suit in ejectment and compelled defendants to show their title and how derived from him if any such title they had or he might have filed his bill of discovery, as he has now done at last in this suit, to ascertain by what right the defendants claimed to withhold his property from him. In the language of Mr. Justice Sawyer in Wood v. Carpenter, 'It does not appear from the averments of the bill that complainant ever made or caused to be made the slightest inquiry as to how he had been divested or despoiled of his large estate'."

The rules as above announced by the Supreme and Federal Courts of the United States are supported by the following cases:

Archer v. Freeman, 124 Cal. 528; 57 Pac. 474;

Bills v. Silver Mining Co. 106 Cal. 9; 39 Pac. 43;

Lady Washington Con. Co. v. Wood et al., 113 Cal. 482; 45 Pac. 809;

Truett v. Onderdonk, 120 Cal. 581; 53 Pac. 26;

Marks v. Evans, (Cal. 1900) 62 Pac. 76;

Hecth v. Slaney, 72 Cal. 363; 14 Pac. 88;

Burke v. Maguire, 154 Cal. 467; 98 Pac. 21;

Montgomery v. Peterson, 27 Cal. App. 671; 151 Pac. 23;

Davis v. Hibernia Sav. & Loan Soc., 21 Cal. App. 444; 132 Pac. 462;
Teall v. Slavin, 40 Fed. 774;
Teall v. Schrader, 158 U. S. 172.

The case of *Archer v. Freeman* (supra) well states the rule as it has been applied by the Supreme Court of this state. This was an action brought to recover damages claimed to have been sustained by plaintiff through certain misrepresentations with respect to the sale of land. The plaintiff commenced negotiations for the purchase of the land in question in November, 1887, and the transaction was completed in January, 1888, at which time he received the purchase money and received the deed for the land. The action was commenced June 25, 1894, which was between 6½ and 7 years after the alleged fraudulent misrepresentations and promises which are claimed to have been made and given at the time of the purchase. Therefore the statute of limitations had run more than twice from the times of the alleged frauds until the filing of the complaint unless under section 338 of the Code of Civil Procedure there was no discovery by the plaintiff of the facts constituting the alleged frauds until within three years next preceding the commencement of the action. The court then lays down the rule as follows:

> "However it is the clearly established law that in such a case a party must be held to have had knowledge of the alleged fraud whenever the means of knowledge existed and the circumstances were such as to put him on inquiry.

> More v. Boyd, 74 Cal. 171, 15 Pac. 670, and cases there cited; Lataillade v. Orena, 91 Cal. 578, 27 Pac. 924; Bills v. Mining Co., 106 Cal. 9, 39 Pac. 43. Therefore, if the plaintiff had the means of knowledge, and was put upon inquiry as to the alleged frauds more than three years before the commencement of the suit, the action is barred."

In this case the fraud relied on consisted of certain alleged misrepresentations of defendants with respect to certain improvements that were going to be made and certain things that were going to be done in connection with the townsite in which plaintiff's property was sold and which plaintiff claimed that he purchased on the strength of these representations. The court held that if the plaintiff had made the proper inquiries and used the proper diligence he would have discovered these frauds within the statutory time.

The rule above stated has been restated time and time again by the Supreme Court of this state, as indicated by the cases above mentioned.

Truett v. Onderdonk (supra),

in which the court said, speaking through Judge Van Fleet:

> "This lack of diligence is as fatal to the relief here sought as it would be in a direct action to recover for the fraud. Equity abhors a stale claim and it was incumbent upon plaintiff to show facts excusing his long delay in asserting the fraud. It is not enough to assert merely that the discovery could not have been made sooner. It must appear that it could not have been made by the exercise of reasonable dili-

> gence. And all that reasonable diligence the discovery by the aggrieved party of the facts constituting fraud or mistake. Under the cases in this state it is not enough to assert that the discovery was not sooner made. It must appear that it could not have been made by the exercise of reasonable diligence; and all that reasonable diligence would have disclosed plaintiff is presumed to have known, means of knowledge in such a case being the equivalent of the knowledge which it would have produced. Truett v. Onderdonk, 120 Cal. 581, 588, 53 Pac. 26; Lady Washington Co. v. Wood, 113 Cal. 482, 486, 45 Pac. 809; Del Campo v. Camarillo, 154 Cal. 647, 98 Pac. 1049. See also Wood v. Carpenter, 101 U. S. 135, 140, 25 L. Ed. 807."

Applying the rule of law above laid down, we submit that this cause of action against defendant in error, Willey, is clearly barred by subdivision 4 of section 338 of the Code of Civil Procedure. The creditor McGinn knew at the time of the automobile suit and his attorney at that time knew by the unimpeachable record of the bank that the monies constituting the special account standing in the name of E. T. Willey had been transferred from the monies of Chas. F. Willey, his brother. He knew at that time more than four years before the commencement of this suit that the seven hundred dollars that was used by E. T. Willey was drawn from that special account. He at that time was disputing the claim of E. T. Willey, through the sheriff, to the said automobile because he believed it belonged to Chas. F. Willey and to substantiate this belief this bank record was produced at the trial.

We submit that under the disclosures that were made at that proceeding that his suspicions should have been aroused that other monies of Chas. F. Willey had also been transferred to E. T. Willey and that he was thereupon put under the obligation to further investigate and that further investigation diligently pursued would have disclosed the fact that the $1500.00 account stood also for a time in E. T. Willey's name and that it also had been transferred from the funds of Chas. F. Willey.

The plaintiff in error in his brief practically admits that our contention with reference to the statute of limitations is correct unless the action is governed by section 11d of the Bankruptcy Act.

We submit that this action is not governed by such section. Section 70e of the Bankruptcy Act which gives the trustee the right to bring this action, provides as follows:

> "A trustee may void any transfer by the bankrupt of his property *which any creditor of such bankrupt might have voided.*"

Now obviously under the very terms of the statute by which the trustee in this case is given the right to sue, he is given only the rights that were possessed by the creditor. In other words, he is subrogated to the rights of the creditor, and is governed and bound by the rules of law under which the creditor could act in setting aside such conveyance. In other words, this action is not strictly an action under the bankruptcy act. The bankruptcy act simply permits the trustee to assert the rights possessed by

the creditor. It does not give him any new rights whatsoever, and if the creditor represented by the trustee in this action was barred by the statute of limitations in the prosecution of this action, then the trustee is also barred.

The cases of *In re Mullen*, 101 Fed 413, and *Holbrook v. First International Trust Company,* Massachusetts, 107 N. E. 665, established the rule that section 70e subrogates the trustee only to the rights of the creditor.

In the case of *Holbrook v. International Trust Company,* an action was brought by the trustee in bankruptcy under section 70e of the United States Bankruptcy Act to recover payments made to the defendants, amounting to $1677.70. The defendants contended, first, that the trustee in bankruptcy could not avoid a transfer of property unless the debtor was insolvent within the definition of insolvent given by the Bankruptcy Act. Second, that the evidence was insufficient to show that the bankrupt was insolvent at the time of the transfer within the definition of the word under the Massachusetts insolvency act.

The court said in answer to these contentions:

> "The first two questions are founded on a misconception of the nature of section 70e of the Bankrupt Act. This section of the Bankrupt Act does not create in the Trustee in bankruptcy a new right to avoid transfers to property made by the bankrupt. All that it does is to give authority to the trustee to avoid any transfers of property made by the bankrupt

which any creditor might have avoided * * *. All that section 70e of the Bankrupt Act does is to give authority to the Trustee in Bankruptcy to enforce the rights of creditors to avoid fraudulent transfers of property made by the bankrupt if such fraudulent transfers have been made. That is to say, whether a particular transfer was or was not fraudulent as to creditors under section 70e *does not depend upon the United States Bankruptcy Act but upon the laws of the state which govern the tranfser of the property in question.* (Italics ours.) See in this connection, In re Mullen, 101 Fed. 413, Collier on Bankruptcy, Tenth Ed. 1042 G and cases cited there and in the foot-note, page 320. It follows that the definition of insolvency prescribed by the Bankruptcy Act, and the definition of insolvency adopted by this and other courts when that word is found in the Massachusetts Insolvency and other Bankrupt Acts have nothing to do with the question.

Under such circumstances it is not necessary in order to avoid a transfer as a transfer made to hinder and delay creditors that the transferor at the time of the transfer was insolvent. If the circumstances are such that the jury can find that the transfer was made with intent to hinder and delay creditors it was voidable."

In other words, the above case holds in a well reasoned decision that the definition of insolvency made in the Bankruptcy Act of the United States did not govern cases brought under section 70e, but that such cases must rest and fall upon the interpretation given to law by the state courts governing such actions.

The same rule is laid down in *In re Mullen,* which holds that section 70e of the Bankrupt Act gives to

the trustee in bankruptcy with respect to the setting aside of fraudulent conveyances only the same rights which are conferred upon the bankrupt's creditors, or any of them, by the common law or the statutory law of the particular state.

Collier on Bankruptcy, Tenth Edition, pages 1042 f and g, lays down the rule as follows:

> "In many cases the trustee will be able to sue under section 67e or section 70e. If under the latter, he must bring himself within the elements of pleading and proofs recognized by the statutes and decisions of his State. The important difference is that if the suit is based on the State law, the *State's statute of limitations applies.*"

In the case of *Manning v. Evans,* 156 Fed. 106, the court said:

> "Its effect (referring to 70e) is to subrogate the trustee to the rights of creditors. Its distinguishing feature is that it authorizes a trustee in bankruptcy to invoke the relief furnished by State laws to creditors for annuling transfers of property by their debtors."

In the case at bar there is only one creditor. The issue is not complicated by the fact that there are numerous creditors and numerous rights to be adjudged and determined. Here the only person whom the trustee represents is the creditor McGinn, and we submit that under the inexorable logic of the above decisions that the trustee is given only the rights that McGinn would have had had the suit been prosecuted in his name, and that there is no question if the suit had been prosecuted in McGinn's

name that the action would have been barred by the statute of limitations pleaded in our answer. The distinction that counsel for the plaintiff in this case failed to make is that this action is not strictly a bankruptcy action, and therefore is not governed by the provisions of the Bankruptcy Act, but is absolutely and wholly governed by the decisions of the state court and the common law that would have governed an action by the creditor to set aside similar conveyances.

In the case at bar it is governed by the sections of the Civil Code of California, viz, sections 3439 et seq., and by the decisions of the courts of the State of California and the United States courts, which are cited herein.

The only case based upon section 70e of the Bankruptcy Act cited by counsel to the contrary is the case of *Sheldon v. Parker,* 66 Neb. 610; 92 N. W. 923.

In this action the excerpt quoted by counsel in his brief is pure and absolute dicta and not necessary to the decision of the court. This dicta is contrary to the principles laid down in the cases which we have cited upon this phase of the action. In the case of *Sheldon v. Parker* (supra) the court lays down the following rule, which is the real point of the decision:

> "As these conveyances were recorded less than four years prior to the commencement of this action, and as there is no evidence in the

> record before us to show that any discovery of the fraudulent character of such conveyances was made prior to the filing of the deeds for record, the presumption must obtain that that is the earliest date at which the creditors had notice of any fraud connected with the transaction *so that these actions would not be barred even under the laws of the State.*" (p. 932.)

Under that decision, therefore, the action was not barred by the state statute, and everything said by the court with reference to the bankruptcy statute of limitations is, as I have said before, pure dicta.

The case of *Arnold Grocery Company v. Shackleford,* 140 Ga. 585; 79 S. E. 470, cited by counsel as sustaining their view, we submit clearly points out the distinction we are making, namely, that in an action strictly governed by the Bankruptcy Act, section II d controls, but that in an action brought under 70e it does not. In the Shackleford case the only question was whether the state statutes of four years' limitations applied. The court held they did not. In this connection the court said:

> "The Arnold Grocery Company bought the goods in payment of a pre-existing debt, and consequently there was no contract, either express or implied to pay for them. It was not suggested that the purchase was made to defraud creditors or for other reasons that it was void at common law or under the statutes of this state. The action was therefore, in no sense, upon an open account or for breach of contract, either express or implied, and would not be barred by the state law as embodied in the above sections of the code. Except for the Bank-

> ruptcy Act the trustee could have no action on account of the purchase of these goods by the Arnold Grocery Company. That Act contained provisions under which the trustee was authorized to sue the Arnold Grocery Company for the value of the goods merely by reason of the fact that the transfer was made within less than four months from the filing of the petition in bankruptcy, notwithstanding it was made in pursuance of a sale in payment of a pre-existing debt which was in other respects valid. * * * Section 60b of the Bankrupt Act was not designed in any event to give the bankrupt a cause of action against the transferee, and therefore a case under that statute would stand on a different footing from a suit or some right of the bankrupt which might by operation of law under section 70a of the Bankrupt Act have passed from the bankrupt to the trustee. Section II d was manifestly intended to apply among others to a case falling under section 60b of the act to the exclusion of any other statute of limitation."

If this action were brought under section 67e or under section 60b of the Bankruptcy Act it would be governed by section II d of said act, because in such cases the cause of action is founded upon the Bankruptcy Act, but under section 70e the cause of action is not founded upon the Bankruptcy Act but upon the rights that the creditor had under the state statutes and law. The trustee is only subrogated to those rights and is not given any new or enlarged rights. The cause of action being governed by the state law is certainly governed by the state statute of limitations as was said in the excerpt from Collier cited supra.

The judgment of the lower court should, therefore, be sustained.

Dated, San Francisco,
February 26, 1921.

Respectfully submitted,

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